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Supreme Court, U.S.
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NO. 91-2055

IN THE
SUPREME COURT OF THE UNITED STATES
October Term

DOUGLAS DWIGHT BENNETT
Petitioner,

V.

THE STATE OF MICHIGAN
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Douglas Dwight Bennett
In Pro-se
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-QUESTIONS PRESENTED

I IS MCL 570.152; MSA 26.332 STATUTE UNCONSTITUTIONAL IN VIOLATION OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II DID THE PROSECUTING ATTORNEY VIOLATE THE DEFENDANT'S 14TH AMENDMENT RIGHTS WHEN CHARGING THE DEFENDANT WITH VIOLATING MCL 339.601, 339.2411; MSA 18.425(601) 18.425 (2411)?

III DID THE TRIAL COURT COMMIT A REVERSIBLE ERROR BY NOT GRANTING THE DEFENDANT'S OBJECTION TO PROSECUTOR'S ENTRY OF EXHIBITS AT TRIAL?

IV DID THE TRIAL COURT COMMIT A REVERSIBLE ERROR BY NOT GRANTING DEFENDANT'S MOTION AT-LAW FOR A DIRECTED VERDICT FOR ACQUITTAL?

V DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY NOT ADEQUATELY INSTRUCTING THE JURY CONCERNING THE APPLICABLE LAW?

VI DID THE TRIAL COURT INFLICT A HARSH AND CRUEL PUNISHMENT WHEN THE DEFENDANT WAS SENTENCED?

VII DID THE DEFENDANT DOUGLAS DWIGHT BENNETT RECEIVE A FAIR TRIAL?

PARTIES TO THE PROCEEDING

Petitioner, Douglas Dwight Bennett, 31093 Lakeview Blvd. #4211, Wixom, Michigan, 48393, without counsel as pro-se. Respondent, Oakland County Prosecuting Attorney, Richard Thompson, 1200 North Telegraph Rd., Pontiac, Michigan, appearing on behalf of the State of Michigan.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

DOUGLAS DWIGHT BENNETT,
Petitioner

versus

THE STATE OF MICHIGAN
Respondent.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Douglas Dwight Bennett, respectfully prays that a writ of certiorari to review the judgement of the opinion of the Michigan Court of Appeals. The opinion is setforth in the attached appendix marked (A).

JURISDICTION

The judgement of the Supreme Court of Michigan was that the court denied leave to appeal, January 30, 1992. The judgement of the Michigan Court of Appeals affirmed the decision of the Sixth Circuit for the County of Oakland, State of Michigan, May 30, 1992. The jurisdiction of the court is invoked under Title 28 USC, §1257(3).

STATUTES INVOLVED

Constitution of the United States Article I §10, clause 1.

Impairment of Contract;

"Impairment of contract," in order to come within this clause, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state.

STATUTES INVOLVED

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Impairment of Contract;

"Impairment of contract," in order to come within this clause, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state.

STATUTE INVOLVED

Constitution of the United States IV Amendment

The right of the People to be secure in their persons, homes, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issued, but upon probably cause, supported by oath or affirmation, and particularly, describing the place to be searched, and the persons or things to be seized.

STATUTE INVOLVED

Constitution of the United States V Amendment;

No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentation indictment of a grand jury, expect in service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a against himself, nor be deprived of life, liberty or property without due process, nor shall private property be taken for public use without just compensation.

STATUTE INVOLVED

Constitution of the United States VI Amendment;

Jury trial for crimes
and procedural rights

"Trial guarantees" that have been applied to the "pre-trial" stages of the criminal process are similarly designed to protect the fairness of the trial itself, Schneckloth v bustamonte, 412 U.S. 218; 36 L.ed.2d 854.

STATUTE INVOLVED

Constitution of the United States VIII Amendment;

Excessive bail, fines, punishments

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

Primary purpose of cruel and unusual punishment clause of this amendment is directed at method or kind of punishment imposed for violation of criminal statutes, nature of conduct made criminal is

ordinarily relevant only to fitness of punishment imposed, Powell v. State of Texas, 392 US 651; 29 L.Ed. 2d.

STATEMENT OF THE CASE

This case now before this Court is the result of the People of the State of Michigan charging Douglas Dwight Bennett, your Petitioner, with three criminal statute violations.

The first charge was Fraudulent Detention or use of the Building Contract Trust Fund, MCL 570.152; MSA 26.332.

The second charge was false pretenses over $100.00, MCL 750.218, cl. 1970 as amended; MSA 28.415.

The third charge was being an unlicensed contractor 339.6013.

The warrant was signed by Margaret Schaeffer, 47th District Court for the State of Michigan, and the warrant was dated May 8, 1986.

That on the 29th of May, Bennett was arraigned before the Honorable Margaret Schaeffer. Bennett stood mute, and

acquiesce quasi jurisdiction of the Court, and appeared without counsel.

That on the , Bennett appeared before the Court, and when he was asked about the issues pending before the Court, his reply was "I will stand on my Constitutional Right." The Supreme Court ruled in Warth v Seldin, 422 US 490; 95 S.ct. 219, to invoke the jurisdiction of the Court the citizen must raise the constitutional issues within the first forum. The Court was so angered that Bennett was ejected from the Court, and was ordered to appear with an attorney or the Court was going to appoint one. This act by the judge would allow the Court jurisdiction over the person; under MCA Title 5, §22-29. Fearful that the Court may take additional actions, Bennett stood guilty before the court.

That on the 4th of June, Bennett appeared before the Court with an attorney. Bennett waived his right on the twelve day rule for pre-exam and the case was adjourned.

That on October 6th, Bennett appeared for the second pre-conference. That after the prosecution and the defense attorney for Bennett presented their arguments before the court, the Judge retired to chambers to decide the issues.

Court reconvened and the judge ruled that there was proof that at least $4,000 should be returned to the Faulkners. The second charge of False Pretense was dropped and the third charge of being an unlicensed contractor wold be bound over by pendant jurisdiction and Bennett was bound over to circuit court for trial.

That on June 20, 1989, Bennett appeared for trial continued through the 29th of June, 1989. The jury found Douglas Bennett "guilty", and on July 27, 1989, Douglas Bennett was sentenced.

That on the 1st of August, 1989, Douglas Bennett appealed to the Michigan Court of Appeals.

That on May 30, 1991, the Michigan Court of Appeals affirmed the ruling of the Circuit Court. (Appendix A) The Defendant Douglas Dwight Bennett appealed to the Supreme Court of Michigan, and on January 30, 1991, the Supreme Court of Michigan denied leave.

Reasons for hearing this case

Is to protect this natural-born citizen's constitutional rights. The first issue is the challenge to the constitutionality of MCL 570.151; MSA 26.331 Fraudulent Detention or use of Building Contract Trust Fund. The petition's argument is that he must be first warned what to do with this trust, and be advised on where this trust is to be placed. THe petitioner's argument is that he was never advised what to do with the trust. The Fourteenth Amendment to the United States Constitution guarantees the right to due process.

During the state criminal proceedings, Bennett challenged the constitutionality of the statute. This challenge was raised on appeal, both in the Michigan Appeals Court and the Supreme Court of Michigan. Now your Petitioner brings this challenge to the Supreme Court of the United States, the only Constitutional Court to decide the

constitutionality of the Michigan statutes that there is a case of controversy on the law.

That after the petitioner researched the MSA, there was no record of taking this issue before the Supreme Court of the United States for determination of the constitutionality of the MCL 570.151; MSA 26.331.

The State of Michigan said the law does not violate the Fourteenth Amendment to the United States Constitution and the Petitioner said the law is vague and in violation of the Fourteenth Amendment to the United States Constitution.

This court and only this court can decide the constitutionality of the Michigan statute.

Therefore, your petitioner prays that this Article III Court accepts this writ of certiorari to settle the controversy that exists between the petitioner Douglas Dwight Bennett and the State of Michigan.

The second issue is that the petitioner in the State criminal proceeding was charged with being an unlicensed contractor. Your Petitioner brings this issue personally before the court.

As the Petitioner set-forth in his petition, James Faulkner contacted Douglas Bennett to build and addition to his house. Both Bennett and Faulkner agreed to a price and did enter into a contract.

Mr. Faulkner went to the Farmington Hills Building Department and obtained a building permit, and Bennett proceeded with the addition. When it was time to inspect the work that was done, the City of Farmington Hills refused to allow work to continue because Bennett was an unlicensed contractor.

That at the trial and on appeal, Bennett argued that in Reynolds v St. Petersburg, 183 So 304, the court said:

"ordinance no. 873-A enacted by the City of St. Petersburg as aforesaid in unconstitutional because the state itself has no right to require the examination and licensing by a board of persons engaged in a mere trade to writ. The trade or business of general contracting is not even normally concerned with the public health, and the aforesaid ordinance is a mere scheme devised for the aggrandizement of certain classes and has no relation to the public health such as will sustain it as a police or sanitary measure, and that its interferences with the liberty of the citizen and his right to contract." (118 ALR 672).

Argument

That it was Faulkner who wanted a total price on the addition. Faulkner testified (Volume V, page , line) that he, Faulkner, was aware of the fact that Bennett did contract work, and he, Faulkner, was satisfied with the work Bennett did to his house.

The fact is that Faulkner took out the building permit, and that all work performed would be inspected by the Farmington Hills Building Inspector, and would meet or

exceed the building requirements. There was no attempt to build the addition to the Faulkner's house without proper inspection to guarantee the well being of Faulkners.

The State of Michigan said the law does not violate Article I, §10, clause 2 of the United States Constitution. The Petitioner argues that he (Bennett) has the right to contract in legitimate trades, that the City of Farmington Hills Building Department is licensed to act under the police powers to protect, in this case, the Faulkner's health and well being.

Therefore, your Petitioner, Douglas Dwight Bennett, prays that this Article III Court accepts this writ of certiorari to settle the controversy that exists between the Petitioner Douglas Dwight Bennett and the State of Michigan.

to guarantee the well being of Faulkners.

The State of Michigan said the law does not violate Article I, §10, clause 2 of the United States Constitution. The Petitioner argues that he (Bennett) has the right to contract in legitimate trades, that the City of Farmington Hills Building Department is licensed to act under the police powers to protect, in this case, the Faulkner's health and well being.

Therefore, your Petitioner, Douglas Dwight Bennett, prays that this Article III Court accepts this writ of certiorari to settle the controversy that exists between the Petitioner Douglas Dwight Bennett and the State of Michigan.

I

IS M.C.L. 570.152 M.S.A., SECTION 26.332 STATUE UNCONSTITUTIONAL IN VIOLATION OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION?

Petitioner answers "yes"
Appellees answers "no"
Trial Court answers "no"
Appeal Court answers "no"

1. While the statute sets forth specific activities deemed criminal, which are easily comprehended by someone in the building construction business; was this reasonable and understanding to Mr. Bennett (petitioner) who was never advised of the statute, and she he be held liable? The main basis for Mr. Bennett's objection to the charges is that he was never advised of the statute, and what constitutes a crime.

2. The Defendant, Mr. Bennett, entered into a contract with Mr. Faulkner (Vol. V,

P.57) to build an addition onto his home. Mr. Bennett was given 8,000.00 to start the addition (Vol. V, p.66). When Mr. Faulkner was questioned: (Vol. V, p. 98) "When you gave Mr. Bennett this money, did you advise Mr. Bennett that this money was to go into a separate fund?" Mr. Faulkner responded, "No."; North Am. Vanlines, Inc. v. U.S. 243 F.2d 693. When Mr. Faulkner asked if he knew if this Building Trust Fund when he gave Mr. Bennett this money, Mr. Faulkner's response was no. (Vol. V, pp. 98-99).

3. This type of cross-examination by Mr. Bennett was to establish the facts that Mr. Faulkner never advised Mr. Bennett on what to do with the money, U.S. v. Rosenburg 347 US 1021, and that Mr. Faulkner knew nothing of this Building Trust Fund. This Building Trust Fund is a legislative law, and before Mr. Bennett can be held accountable, he must be fore-warned 12 A.L.R. 3d. 1448 U.S. v. Butler 204 F. Supp. 339.

4. Mr. Faulkner admitted that, due to the fact that Mr. Bennett was not a licensed builder, he could not finish the addition (Vol. V, p.105). As the testimony states, Mr. Bennett prepared the job as far as he could (Vol. V, pp. 102-104), using the money Mr. Faulkner gave to him to pay labor or material men who either worked on the addition or delivered material to the job.

5. In an attempt to resolve the issue of the remaining money, Mr. Bennett submitted to Mr. Faulkner a cost breakdown of the money spent on the addition. Mr. Bennett was willing to pay back to Mr. Faulkner the remaining balance (Vol. V, p. 108). During the trial, Mr. Faulkner gave several conflicting answers when Mr. Faulkner was questioned about the remaining balance. When Mr. Bennett asked Mr. Faulkner, "Did you feel that you were entitled to additional money, other than that amount

Mr. Bennett was willing to return?", Mr. Faulkner's response was "yes", (Vol. V. P. 108). Mr. Faulkner's feelings were that he was entitled to the full 8,000.00 (Vol. V, pp. 113-114).

6. Not knowing of the Building Trust Fund Statutes, Mr. Bennett only did what he thought was reasonable with the money that Mr. Faulkner had given to him to first pay laborers and material that was delivered to the Faulkners. Being an individual, most companies prefer cash, and that is why Mr. Bennett converted the down payment into cash (Vol. V p. 161). The prosecuting attorney fail to prove otherwise. That Mr. Bennett retained the balance in cash and was more than willing to return the balance; only the balance is required to be returned.

7. Referring to the Statute of the Building Trust Fund being a legislative law, the Defendant cannot be held liable

unless first being warned of the law (Vol. VI, pp. 19-20) People v. Purifey 34 Mich. App. 318, 191N.W.2d. 63.

The concept of vagueness or indefiniteness rests on the Constitutional principles that procedural due process requires fair notice and proper standards for adjudication. The primary issue involved is whether the provisions of a penal statute is sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judge and jury of standards for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional.

8. Crime must be defined with certainty. This is not only a common law requirement, but is now regarded as an element of due process. The underlying principle is that a person ise entitled to be informed as to what the state forbids and should not be required to speculate as to the meaning of a penal legislation. More particularly, a statute which either forbids or requires the doing on an act in terms so vague that

men of common intelligence must guess as to its meaning lacks the first essential of due process of law 12 A.L.R. 3d 1448, U.S. v. National Dairy Products Corp. 372 U.S. 961, U.S. v. Harris 347 U.S. 612m U.S. v. Cardiff 344 U.S. 174, Boyce Motor Lines v. U.S. 342 U.S. 337.

ARGUMENT

Therefore, the Petitioner's theory of law is that the Petitioner was never advised of the law. M.C.L. 570.152 M.S.A., Section 26.332, and the petitioner only acted reasonably in first paying for subcontractors, material men. The Petitioner cannot be held liable.

II

DID THE PROSECUTING ATTORNEY VIOLATE THE DEFENDANT'S 14TH AMENDMENT RIGHTS WHEN CHARGING THE DEFENDANT WITH VIOLATING M.C.L. 339.601, 339.2411 M.S.A. 18.425 (601) 18.425 (2411)?

Petitioner answers "yes"
Respondent answers "no"
Trial Court answers "no"

On the charges of being an unlicensed contractor, did the prosecutor act before the fact. As Mr. Faulkner testified (Vol. V, p. 105), the City of Farmington Hills would not approve the footings. The reason given was that Bennett was an unlicensed contractor. When Mr. Shinavard was examined by Mr. Bennett, he stated that a license was not required for the laying of cement (Vol VI, p. 32). Holding true to a Wyoming law similar to the Michigan law , the requirement that a person be licensed to lay cement was unconstitutional Sampson

v. Sheridan 25 Wyo. 347, 170 p.1. The statute clearly states "The practice of the occupation of residential building, the prosecuting attorney must prove all elements of the crime U.S. v. Sheiner 273 F. Supp. 977. This is clear by the facts that the action by the City of Farmington HIlls was before the fact. All that Mr. Bennett did was prepare the Faulkner's addition for the laying of cement. Mr. Bennett did nothing to alter the Faulkner's home or any type of residential building to the Faulkners. To be charged with a crime, the prosecuting attorney must prove that is what Mr. Bennett did (Vol. V, pp. 98-105).

Peoples exhibit No. 7 on the cost breakdown (Vol V, pp. 90-93) indicates that Bennett used other laborers and material men on the Faulkner's addition. The prosecuting attorney failed to establish that it was Mr. Bennett who was intending to do the building alteration on his own.

Mr. Faulkner was advised by Mr. Bennett that he would sub-contract the work (Vol. IV, p. 16). Intent in a criminal case is an essential element U.S. v. Lester 386 U.S. 938. The prosecutor must establish intent to establish built U.S. v. Byrd 352 F2d 570. The prosecutor failed to establish fact as well as intent regarding the charges of being an unlicensed contractor. The only fact that the prosecuting attorney established was that Mr. Bennett entered into a contract with Mr. Faulkner, a right guaranteed under Article 1 - Section 10 U.S. Code annotated.

ARGUMENT

Citing Alma G. Reynolds vs City of St. Petersburg 183 So. 304; 118 ALR 667.

The Faulkners have a right to hire a friend to do building to their residence. That the Faulkners obtained the Building permit. There was no representation that

the Petitioner (Bennett) was a licensed builder.

That the Faulkners have a right to use ones property as they will is a fundamental constitutional guarantee, I.D. 118 ALR 672.

The power invested in this case is that the building inspection department is to inspect the building, to see that the building conforms to the building codes.

The Petitioner only entered into a contract to build an addition to the Faulkner's residence, Article I - Section 10 U.S. Code Annotated. In this case, the State of Michigan, by and through its police powers, acted without constitutional authority.

The Faulkner's were protected from harm by the building permit, which allowed the City of Farmington Hills Building Department to inspect the addition, and if

the addition passed inspection, the city would grant an occupancy permit, protecting the Faulkner's from injury.

Therefore, the action of the Oakland County Prosecuting Attorney was not justified in charging the Petitioner as being an unlicensed contractor.

III

DID THE TRIAL COURT COMMIT A REVERSIBLE ERROR BY NOT GRANTING THE DEFENDANT'S OBJECTION TO PROSECUTOR'S ENTRY OF EXHIBITS AT TRIAL?

Defendant-Petitioner answers "yes"
Plaintiff-Respondent answers "no"
Trial Court answer "no"
Appeal Court answers "no"

Throughout the trial, Mr. Bennett objected to the Prosecutor's entering the exhibits for the judge and jury to review. The 1st exhibit that the prosecutor attempted to enter was the contract that Mr. Bennett entered into with Mr. Faulkner (Vol. V, p. 58). Mr. Bennett objected, citing the contract was civil. This is a criminal matter (Vol. V, pg. 58). This is a violation of my 4th Amendment Constitutional Right of an illegal search and seizure of private papers People v. Ward 62 Mich App. 46. Mr. Bennett also cited a violation of his 5th Amendment Right, that the contract was acting as

self-incrimination testimony, as for the fourteenth Amendment, the due process clause on the contract.

The second and third exhibit that the prosecutor moved for admission was also objected, citing a violation of 4th, 5th, and 14th Amendment to the United States Constitution (Vol. V, p. 67). Mr. Bennett cited People v. Miller, 78 Mich. App. 336. Miller conviction was obtained by the evidence that the prosecuting attorney submitted to the court, and Miller, failing to timely object, the court denied the objection.

The prosecutor introduced exhibit 4; the court's error at this point in failing to advise Mr. Bennett is their objection (Vol. V, p. 78). At the prosecutor attempted to mis-state the pictures, Mr. Bennett objected (Vol. V, p. 73), and this was overruled by the court.

The 5th proposed exhibit that the

prosecuting attorney presented was a letter that Mr. Faulkner wrote to Mr. Bennett, and an objection was made (Vol. V, p. 79) and the court overruled.

The 6th exhibit was a statement of agreement to either complete the job or return the balance that wasn't used (Vol. V, pp. 84-85), only confirming the fact that Mr. Bennett was willing to return the balance and Mr. Faulkner was satisfied with this arrangement (Vol. V, p. 87).

Regarding the people's own exhibit no. 7, the court ruled (Vol. IV, pp. 33-34) that the prices charged to Mr. Faulkner were reasonable, and that when Mr. Faulkner refused to take the remaining balance, he waived his rights to recover, and this waiver prevented Mr. Faulkner from being charged against Mr. Bennett under the fraudulent detention or use of the Building Trust Fund Statute (Vol. V, pp. 107-114).

During the course of the trial, the

prosecutor continued to submit exhibits and call witnesses to testify. Mr. Bennett objected and the court dismissed and overruled Mr. Bennett's objections.

The witness that caused the most damage to Mr. Bennett getting a fair trial was when the court allowed Audrey Steinhoff to testify. Mr. Bennett objected (Vol. VI, p.4) and also cited People v Sadler. The Michigan Court of Appeals ruled that a prior conviction cannot be used (Vol. VI, p. 5). This was a violation of the Defendant's right to a fair trial.

IV

DID THE TRIAL COURT COMMIT A REVERSIBLE ERROR BY NOT GRANTING DEFENDANT'S MOTION AT-LAW FOR A DIRECTED VERDICT FOR ACQUITTAL?

Defendant-Petitioner answers "yes"
Plaintiff-Respondent answers "no"
Trial Court answers "no"

After the prosecuting attorney called his last witness, Mr. Bennett petitioned the court for a directed verdict At Law for acquittal (Vol. VI, pp. 19-23). This criminal action centers around the contract that Mr. Bennett entered into with Mr. Faulkner to build an addition to the Faulkner's residence.

During the trial, Mr. Faulkner stated that he (Faulkner) approached Mr. Bennett to bid an addition to the Faulkner home. The fact is that Mr. Bennett never advertised to be or represented himself as a licensed builder. Brown v. Glass 167 S.E. 722 and Wahlstrom v. Hill 213 Wis 53.

That contract was a simple form, nothing within the contract suggested that

Mr. Bennett was a licensed builder or that he (Bennett) would obtain a building permit. Petitioner, Bennett, has a right to contract. This issue of the right to use one's property as he wills are constitutional guarantees, but are not immune from regulation or limitation.

His contract is very similar to the description stated in State Exrel. Reynolds v. St. Petersburg 183 So. 304 118 A.L.R. 1st p. 676.

"We recognize that there is a vast difference between the position of an owner who undertakes to construct his own building with labor employed by him for that purpose, and that of the owner who undertakes to construct his building under a contract with a builder as a general contractor, to furnish all labor and material necessary for the construction of the building. In the first instance, the owner relies upon his own knowledge and experience in such matters, while in the latter instance, he must rely upon the knowledge, experience and integrity of the contractor.

When Mr. Faulkner obtained the building permit, he acted as the general

contractor and Mr. Bennett acted as the sub-contractor, to oversee the entire addition. Mr. Bennett advised Mr. Faulkner he would hire other sub-contractors (Vol. IV, p. 16), holding to the language the court used in the Reynolds Case 183 So 304.

As for the Building Trust Fund, Mr. Faulkner never advised Mr. Bennett of this law, and as Mr. Faulkner testified, he did not know of the law. In order for Mr. Bennett to be held accountable, he must first be advised what is criminal and what is not. What Mr. Bennett did, not knowing of the Building Trust Fund, was to first pay labors and material men and retained the balance. Mr. Bennett chose to withhold this in cash.

With respect to the contract between Mr. Bennett and Mr. Faulkner, the City of Farmington Hills order all work to stop. A reasonable agreement was reached at that time; Mr. Bennett would pay back the

balance that hadn't been used in an attempt to justly resolve the credit. With respect to the law M.C.L. Sec. 570.152, M.S.A. Sec. 26.332, all that is required is to return the balance of the Trust Fund, and only refund the balance. Mr. Bennett was in his right to refuse Mr. Faulkner's request that the entire amount of $8,000.00 to be returned (Vol. VI, pp. 19-23).

The second charge, that Mr. Bennett was accused of being an unlicensed building contractor, the prosecuting attorney failed to prove that Mr. Bennett did alter the Faulkner residence. All Mr. Bennett did was prepare the Faulkner's addition for footings and for the laying of cement blocks. In Wilson v. District of Columbia, 26 App. D.C. 110, the court ruled that a contractor's license was not required. The prosecuting attorney failed to prove that most of Mr. Bennett's income was from being an unlicensed contractor State v. McNally

12 So. 117.

That Mr. Bennett was not required to renew his Motion for a Directed Verdict after calling his witnesses, John T. Waid and Ernest Shinavard. All that was given was testimony Pritchett v. U.S. 185 F.2d 438, Hall v. U.S. 335 US 839, Hiatt v. US, 390 US 998.

The facts presented by the prosecuting attorney were not adequate to support the charges McKenzie v. U.S. 266 F.2d 524. Throughout the trial, Mr. Bennett cited his 5th Amendment was being violated Diaz v. US 391 F.2d 932.

Therefore, by the fore-mentioned reason, the trial judge erred by not allowing Mr. Bennett his Motion for Acquittal Pritchett v. US 341 US 905, and therefore, the Motion for Directed Verdict should have been granted.

V

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY NOT ADEQUATELY INSTRUCTING THE JURY CONCERNING THE APPLICABLE LAW?

Defendant-Petitioner answers "yes'
Plaintiff-Respondent answers "no"
Trial Court answers "no"

The trial court, during the instruction phase of the trial, relied very heavily on the Michigan standard jury instruction when charging the jury. The court compounded its error further when it refused to explain the elements of the fraudulent detention or use of the Building Trust Fund, and the second charge of being an unlicensed contractor. The court felt that the meaning of this statute, although unclear, was discernible from the facts brought out at trial. The court placed too great a burden on the shoulders of the jury, expecting too much from their decision-making capacity.

The offered instructions were based upon theories and defenses raised during

trial. The Michigan Court of Appeals in Rone, Supra 711 quoted from the Michigan Supreme Court stating:

In People v. Reed, 383 Michigan 342, 349-350 224 N.W. 867.

> The Supreme Court summarized the duties of a trial court to properly instruct its jury. If supported by the evidence, a trial judge must include instructions or any theories or defenses raised.

The trial court erred by not advising the law M.C.L. 570.152, M.S.A. states that only the money be retained to first pay laborers and material men and retain the balance. That Mr. Bennett was only required to refund the balance, not the entire $8,000.00. The prosecuting attorney must prove that Mr. Bennett failed to return the balance and that he used the balance for other projects. The prosecuting attorney must prove that the Faulkners were denied this balance of $4,400.00 by Mr. Bennett. That all Mr.

Bennett was required to refund was the balance not the entire $8,000.00.

The second charge of being an unlicensed residential contractor M.C.L. 339.601, 339.2411, M.S.A. 18.425, (601) 18.425 2411) requires that the prosecuting attorney prove Mr. Bennett did alter or do residential maintenance to the Faulkner's residence, and that is what Mr. Bennett does for a living.

Therefore, by the forementioned the trial judge did err in the instruction of the law to the jury.

VI
DID THE TRIAL COURT INFLICT A HARSH AND CRUEL PUNISHMENT WHEN THE DEFENDANT WAS SENTENCED?

Defendant-Petitioner answers "yes"
Plaintiff-Respondent answers "no"
Trial Court answers "no'

On the 27th of July, 1989, Mr. Bennett was sentenced by the court to pay $100.00 in fines, $1,000.00 in cost and $8,671.00 in restitution. Mr. Bennett only challenges the sentencing of the count in part as harsh, cruel and in violation of his constitutional right to due-process.

The 8th Amendment to the United States Constitution guarantees to a defendant that the court has no right to inflict excessive bail, fines, or punishments. During the preliminary examination (Vol. VI) the court ruled that Mr. Bennett was to be bound over to the circuit court on the fraudulent detention or use of the Building Contract Trust Fund (Vol. IV, pp. 23-35). The court stated that at least $4,000 should have been returned to the Faulkners ($4,400.00 to be exact), and that was the amount that

Mr. Bennett was bound over to circuit court on.

The second issue is: Did the trial court have the authority to require Mr. Bennett to pay restitution in a state criminal act ion.

Under the 14th Amendment, Mr. Bennett is guaranteed to due-process in a criminal action Quigg v. Crist 449 U.S.922. The court must meet four essential elements (1) person must have recognized liberty or property interest at stake, (2) Every temporary deprivation of that liberty or property will satisfy required element of due-process clause, (3) There must be some form of state action, which deprives individual of his liberty or property, and (4) There must be some legitimate government or public reason asserted for depriving individual of his liberty or property Craig v. Carson 449 F. Supp. 385.

That under the Federal Rules of

Criminal Procedure, Title 18, Section 242, when a conviction is obtained, only fines and costs are part of the judgement of the court. Recovery of damages is by a civil action. Brown v. Duggan 329 F. Supp. 207, Spotted Eagle v. Blackfeet Tribe of Black Feet Indian Reservation 55 F.R.D. 550. U.S. v. City of Philadelphia 644 F.2d 962.

That if the Federal Courts are forbidden to impose civil damages within a criminal case, then the duty of the state court have the same obligation to enforce constitutional rights. Scott v. Frey 330 F. Supp. 365, People v. Billingsley 20 Mich. App. 10. The trial judge in sentencing Mr. Bennett executed the will of the judge and not the will of the law People v. Bruner 175 N.E. 400.

The trial judge, when sentencing Mr. Bennett, gave no consideration towards the evaluation of the probation department (Vol. VII, p.8), which only recommended

probation, meaning that after all was considered by the probation department. The department felt that Mr. Bennett wasn't a threat to society by only recommending probation. The trial judge in sentencing Mr. Bennett gave no consideration to the probation department's report.

PRAYER FOR RELIEF

WHEREFORE, your Petitioner-Defendant Douglas Dwight Bennett prays that this Article III Court find the following:

A. That M.C.A., Section 570.152, M.S.A., Section 26.332, Fraudulent Detention of Use of Building Trust Fund Statute , is unconstitutional and in violation of Petitioner's Fourteenth Amendment to the United States Constitutional. That the Petitioner was

never advised of the statute and therefore should not be held liable for violation of the statute. The Petitioner only did what men of common knowledge would do with the Trust; first pay labor, then material men.

B. That the Petitioner was wrongfully charged for violation of M.C.L. 339.601, 339.2411, M.S.A. 18.425 (601) 18.425 (2411), that the petitioner has a right to make contracts under Article I, Section 10, clause 2, and to work at a legitimate trade.

C. That the trial court failed to dismiss the exhibits submitted by the prosecution. That the exhibits presented violated the Defendant-Petitioner's 5th, 6th and 14th Amendment Rights to the United States Constitution.

D. That the trial court erred by not granting the Defendant-Petitioner's Motion at-law for a directed verdict for an acquittal.

E. That the trial court failed to adequately instruct the jury.

F. That the trial court inflicted a harsh and cruel punishment in violation of the 8th Amendment to the United States Constitution, and reverse the decision of the trial court.

May 31 1992
Date

Douglas Dwight Bennett
1426 Appleford
Walled Lake, MI 48390
(313) 624-5418

VII
DID THE DEFENDANT DOUGLAS DWIGHT BENNETT RECEIVE A FAIR TRIAL?

As your petitioner has stated just for raising his constitutional right he, Bennett, was threatened with a forensic examination, Vol. II, page 3 , and was ejected from the court, a clear violation of Title 18, USC §1512, tampering with a witness or victim or an informant.

A. Whoever knowingly uses intimidation or physical force or threatens another person or attempts to do or engages in misleading conduct to ward another person with intent to:

B. cause or induce any person to:

a. alter, destroy, mutilate or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding

shall be fined not more than $250,000.00 or imprisoned not more than ten years or both.

Argument

The actions of Margaret Schaeffer and Robert Hedges as set forth in Vol. II page 2 can only be described as persons, and that the moving force behind their action could only be said to be personal, and that Margaret Schaeffer and Robert Hedges should not be allowed to hide behind the eleventh Amendment to the United States Constitution. The actions of both Schaeffer and Hedges is in direct violation of their oath of office, and violates both the Michigan and United States Constitutions, and the guarantees of the Sixth Amendment.

Therefore, your Petitioner petitions this court in view of Warth v Seldin, 422 US 490; 95 S.ct. 2197, to act on this court's motion to have the United States Justice Department investigate the allegations of Douglas Dwight Bennett, the

Petitioner, to bring the wrongdoers to justice to protect the rights of the Petitioner.

During the state criminal proceeding that Bennett was the Defendant on cross-examination of Mr. Faulkner by Mr. Bennett, Faulkner was questioned: "You've indicated to the court that work was stopped; could you tell the court why and who you were ordered by to have this work stopped?" (referring to the work that Bennett was doing to the Faulkner house) He **answered** I'm not aware that we were ordered to stop work (Vol. V, page 23). Mr. Bennett **questioned:** "Did not the City of Farmington Hills by and through the Building Inspector, John T. Waid, notify you to cease all work." Mr. Faulkner **answered:** "I'm not aware." Mr. Bennett **questioned:** "You're not aware of that?" Mr. Faulkner **answered:** "I'm not aware that we were ordered to stop. You're the one who stopped. Mr. Bennett **questioned:** "Did the

building department ever notify you to cease operations?" Mr. Faulkner answered: "I am not aware of the building department notifying me." (Vol. V, page 24).

That within the appellees', L. Brooks Patterson and John Nichols, brief on appeal to the Sixth Circuit Court of Appeals, no. 88-1761, the appellees stated that "shortly after Plaintiff began work on the addition, the Faulkners, allegedly acting under the instruction of a Farmington Hills city employee, John T. Waid, refused to allow Plaintiff to finish construction on the addition." (Appendix D).

This is proof that the Faulkners were advised that the City of Farmington Hills advised them to stop all work on the addition.

The statement made by James Faulkner falls with the provisions of Title 18 USC §1621 Perjury Generally.

1. Having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be a administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true.

Argument

The facts that your Petitioner has set-forth is that James Faulkner perjured himself several times only to portray to the jury that Bennett was nothing more than a common thief, which is far from the truth.

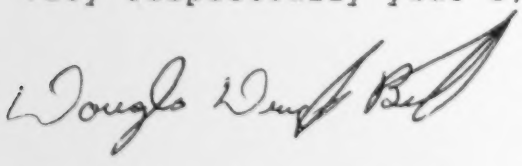
It must be asked of this Article III

Court to review the facts and reach the conclusion that Bennett, in the state criminal proceeding, did not receive a fair trial, and on this Court's own motion to petition the United States Justice Department to intervene within the proceeding to protect this individual citizen's constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, Petitioner, Douglas Dwight Bennett, prays that this Article III Court grant this writ of certiorari, so that equal justice will be served.

Very respectfully your's,



Douglas Dwight Bennett

91-2055 (2)

Supreme Court, U.S.
FILED
JUN 1 1992
OFFICE OF THE CLERK

APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

May 30, 1991

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v. Nos. 119494;121015

DOUGLAS DWIGHT BENNETT,
Defendant-Appellant.

Before: Walhls, P.J., and Hood and Cavanagh, JJ.

PER CURIAM.

On June 28, 1989, following a jury trial, defendant was found guilty of violating the building contract fund act, MCL 570.151 et seq., MSA 26.331 et seq., and of acting as a building contractor without a license, MCL 339.601; MSA 18.425(601). On July 27, 1989, defendant was sentenced to pay a $100 fine, $1,000 in costs, and $8,671 in restitution by noon on

august 3, 1989, or to spend six months in jail for violating the building contract fund act. For acting as a building contractor without a license, defendant was ordered to pay a $100 fine and $100 in costs by noon on August 3, 1989, or to spend 30 days in jail.

In appeal number 119494, defendant raises a constitutional attack on the building contract fund act, contends that the prosecutor erred in charging him under MCL 339.601;MSA 18.425(601), and that the trial court erred in admitting certain exhibits, in denying his motion for directed verdict of acquittal, in instructing the jury, and in imposing a cruel and harsh sentence. In appeal number 12015, defendant claims that the prosecutor improperly had him jailed when he failed to comply with the judgement of sentence and was guilty of extortion. In addition, defendant contends that the trial court

improperly imposed restitution and lacked jurisdiction to enforce the judgement of sentence because of his pending appeal. We find no merit in any of these arguments.

In appeal number 119494, defendant claims that the statute under which he was convicted, the building contract fund act, is unconstitutional because it is so vague he could not determine its meaning. We disagree.

MCL 570.151; MSA 26.331 provides:

> In the building construction industry, the building contract fund paid by any person to a contractor . . . shall be considered by this at to be a trust fund, for the benefit of the person making the payment, contracts, laborers, subcontractors or materialmen, and the contractor or subcontractor shall be considered the trustee of all funds so paid to him for building construction purposes.

Under MCL 570.152; MSA 26.332:

> Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefor, of any payment made to him, for any other purpose than to first pay laborers, subcontractors and

> materialmen . . . shall be guilty of a felony in appropriating such funds to his own use . . . and may be prosecuted upon the complaint of any person so defrauded, and, upon conviction, shall be punished by a fine of not less than 100 dollars or more than 5,000 dollars and/or not less than 6 months nor more than 3 years imprisonment in a state prison at the discretion of the court.
>
> Under MCL 570.153; MSA 26.333:
>
> The appropriation by a contractor, or any moneys paid to him for building operations before the payment by him of all moneys due or so to become due laborers, subcontractors, materialmen or others entitled to payment, shall be evidence of intent to defraud.

After reviewing these provisions, it is apparent to us that the act requires that monies received for a construction project be expended for that project and that any moneies paid to a contractor be held in trust for that purpose. Clearly, use of the money for purposes not mentioned in the act would expose the contractor to a criminal penalty. We easily can agree that the act is not vague. See People v Miller, 78 Mich App 336, 344-345; 259 NW2d 877 (1977).

In the next issue, defendant claims that the prosecutor improperly charged him of being an unlicensed building contractor because all he did was prepare the complainant's home for the laying of cement and he had no intention of doing the building alternations himself. Consequently, defendant maintains that there was insufficient evidence on which to find him guilty or being an unlicensed contractor.

MCL 339.601; MSA 18.425(601) provides:

> (1) A person shall not engage in or attempt to engage in the practice of an occupation regulated under this act or use a title designated in this act unless the person possess a license or certification of registration issued by the department of the occupation.
>
> * * *
>
> (3) A person, school, or institution which violates subsection (1) . . . is guilty of a misdemeanor, punishable by a fine of not more than $500.00, or imprisonment for not more than 90 days, or both.

Under MCL 339.2401(b);MSA 18.425(2401)(b):

> "Residential maintenance and alteration contractor" means a person who, for a fixed sum . . . undertakes with

> another for the . . . laying of concrete on residential property . . .

In this case, the prosecutor submitted proof that defendant agreed with the complainant to do some alterations to the complainant's residence and that defendant had removed some bricks off the garage wall, broke up the cement, and started the footings with the intent to lay concrete on complainant's property. Therefore, in light of the statutory definition of a residential maintenance and alteration contractor, the evidence was sufficient to show that defendant had engaged in or attempted to engage in an occupation for which a license was needed.

We also find no error in defendant's next claim which concerns the trial court's decision to admit, over defendant's objections, exhibits and similar acts evidence offered by the prosecution. As to

the exhibits, we find no abuse of discretion in the trial court's decision to admit this evidence. See People v Watkins, 176 Mich App 428, 430; 440 NW2d 36 (1989). Nor do we find any error of constitutional proportion. As to the introduction of the similar acts evidence, because intent to defraud is an element that must be proved by the prosecution, the trial court properly allowed the similar acts evidence. Se People v bates, 91 Mich App 506, 510-511; 283 NW2d 785 (1979).

We also reject defendant's argument that the trial court erred in denying his motion for directed verdict of acquittal because he claims he never represented himself as a licensed builder, never agreed to obtain a building permit, never acted as a general contractor, and never refused to return the unused portion of the complainant's down payment. A rational trier of fact could have found that defendant, while engaged in the building

construction business, retained, with the intent to defraud, part of the payment made to him for a purpose other than the payment of laborers, subcontractors and material men. People v Hampton, 407 Mich 354, 368; 285 NW2d 284 (1979).

As to defendant's claim of instructional error, we believe that the instructions to the jury fairly presented the issues to be tried and sufficiently protected the defendant's rights. People v Watkins, 178 Mich App 439, 450; 444 NW2d 201 (1989).

Finally, we find nothing harsh or unusual about the sentence that were imposed in this case.

With respect to the issues defendant raised in case number 121015, we find them so totally without merit that they do not warrant discussion.

Affirmed.

APPENDIX B

ORDER
Entered: January 31, 1992

92024 [Docked July 23, 1991]

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS DWIGHT BENNETT

SC: 92034
COA: 119494, 121015
LC: 86-75808-FH

Defendant-Appellant.

On order of the Court, the delayed application for leave to appeal is considered, and it id DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No.

A-774

DOUGLAS DWIGHT BENNETT,

Petitioner

v.

MICHIGAN

O R D E R

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including May 30, 1992.

Volume I

The arraignment of the Defendant, Douglas Dwight Bennett, District Court No.: 86-04-14736FY, proceeding before the Honorable Margaret G. Schaeffer, District Judge for the 47th District Court on May 29, 1986, Pages 1-5

Page 4

Line 11: [DET. MCKENZIE]: I also had a phone conversation on May

Line 12: 8, 1986 with an individual identifying himself as Douglas

Line 13: Dwight Bennett, the Defendant in this incident, that phone

Line 14: call was approximately 1:25; I asked him to voluntarily

Page 4 continued

Line 15: surrender himself to me, which he stated he would not and

Line 16: stated words to the effect --whatever location we could

Line 17: find him.

Line 18: **THE COURT**: So you did go out and arrest

Line 19: him?

Line 20: **DET. MCKENZIE:** Walled Lake Police

Line 21: Department arrested him for me, Your Honor.

Line 22: **THE COURT**: Mr. Bennett, anything to say

Line 23: on the matter of bond?

Line 24: **MR. BENNETT**: Yes, Your Honor. The

Line 25: reason why I could not voluntarily submit to the action

Line 1: [Bennett]: which was taking place, I would lose my jurisdictional

Line 2: action which I may assert and would also like to state,

Line 3: like the detective has stated, this is the first criminal

Line 4: offense felony. . .

Volume II

Page 1

Line 21: **THE COURT**: You will have to have an

Line 22: attorney here on this matter. You indicated apparently

Line 23: you were going to retain your own attorney?

Line 24: **MR. BENNETT**: I wish to stand at this

Line 25: point in time in the Court, Your Honor, in Personam at

Page 2

Line 1: [Mr. Bennett]: law under common laws exercising my full constitutional

Line 2: rights at this time.

Line 3: **THE COURT:** You want to represent your-

Line 4: self?

Line 5: **MR. BENNETT:** Correct, Your Honor

Line 6: **THE COURT:** Mr. Hedges --

Line 7: **MR. BENNETT:** I --

Line 8: **THE COURT:** Just a minute.

Line 9: **MR. HEDGES:** Your Honor, the People would

Line 10: prefer to have an attorney because of the nature of the

Line 11: charges and the seriousness of the charges.

Line 12: (¶) I tried to conduct a meaningful Pre-Exam

Line 13: Conference with Mr. Bennett. He is saying things to me

Line 14: like he is going to remove the case to the Circuit Court

Line 15: [Mr. Hedges]: or Federal Court and join it with other cases and clearly

Line 16: I don't think he understands the nature of the criminal

Line 17: proceeding. I think he definitely needs to be repre-

Line 18: sented by a lawyer.

Line 19: **THE COURT:** You think he understands

Line 20: the nature of the proceedings or think he should be

Line 21: referred for a forensic exam?

Line 22: **MR BENNETT:** Your Honor --

Line 23: **THE COURT:** Just a minute. I am talking

Line 24: to Mr. Hedges right now.

Line 25: **MR. BENNETT:** Sorry, Your Honor.

Line 1: **MR. HEDGES:** Can't comment on the foren-

Line 2: sic part, Your Honor. I don't know if it is just con- . . .

BY MR. HEDGES:

Q. Mr. Faulkner, how much work did Mr. Bennett do on the project?

A. He removed the cement blocks off the side of the house. He removed the patio -- large patio cement area -- broke it up and removed that and stared the footings, and did the front door, and took down the garage door opener.

Q. Did you take any photographs of the condition of your . . .

BY MR. HEDGES:

Q. Mr. Faulkner, did Mr. Bennett explain to you how he was going to do all this work?

A. He explained some of it would be -- much of it would be done by himself and he would sub-contract other jobs.

Q. Now, did you -- between the time the contract -- the bid was accepted and you had the contract and the time when Mr. Bennett was finally done working, did you have any conversation with him?

A. Many times.

Q. And who started those conversations -- who called whom?

A. I suppose it was myself wondering what was the hold-up,

why haven't we seen him? He might be there an hour and disappear and wouldn't see him for three or four days and we had to call him at his home and find out what was happening.

Q. Do you remember how many times you contacted him about working on your premises?

A. I now I should have kept a record, but I didn't. It was so many times -- finally we sent him a certified letter about the condition of the work that he was doing.

MR. PARTRICH: Your Honor, I would object to the vagueness of the answer in terms of the number of times.

THE COURT: Objection overruled. I think your objection again goes to the weight and not admissibility.

BY MR. HEDGES:

Q. At some point did Mr. Bennett ever give you any additional documents?

A. I don't recall.

Q. Did you have further discussions with him?

A. Oh, I'm sorry, yes, yes. After the certified letter and then we met again at his home and I said I would like -- if you can't continue the work I wold like to have my money back, and then he would say well, he said he would make out a bill for what he had already done and to come

to an agreement at that time for a refund.

Q. I am showing the witness what has been marked People's Proposed Exhibit 7, Mr. Faulkner, do you recognize what that is?

A. Yes.

Q. What is that?

A. That his is [is his] estimate of what work he had already done.

Q. And whom did you receive that form [from]?

A. Mr. Bennett.

Q. Did you receive that from him in person?

A. Yes.

Q. Do you recall when?

A. I think it was in January.

Q. Of what year?

A. Eighty Five.

Q. Let me show you what has been marked People's Proposed Exhibit 8, do you recognize what that is?

A. It is like an ultimatum letter that we drew up when he was at our home saying -- and he agreed that he would complete the job in three weeks, January 29 of '85 to avoid cancelling the agreement and refund of the deposit.

MR. PARTRICH: Objection, rather than testifying from knowledge he is reading the document.

PAGE 18 continued

THE COURT: He may testify what he recalls the agreement was. Suppose you should not be

PAGE 19

reading it. You can state what you understand he agreed to, but don't read it from the document at this point.

PAGE 20

A. Well, being a customer and a friend I knew he has done different building jobs and figured he would do a pretty good job for us.

PAGE 32

[The Court]:. . . false pretenses. If that is not, I don't see how this can be. So I will

[The Court]: dismiss that one.

With regard to the charge of fraudulent detention or use of building contract trust fund, the problem is more difficult. The only case in point has been mentioned by Counsel is People vs. Miller, 78 Mich App 336. It is the only case that seems to deal with that particular statute and interpretation of it.

After reviewing that case carefully, I am satisfied that the fact evidence in this case establishes that the crime charged of fraudulent detention or use of building contract trust fund was committed and probable cause to believe it was committed by Douglas Dwight Bennett. In this instance the evidence is that Mr. Bennett receives some $8,000 from Mr. and Mrs. Faulkner to build an addition on the home; that he did some work and did not complete

PAGE 32 continued

[The Court]: it; that the contract itself was entered into September 17 of 1984; that toward the end of 1985 work had not been completed and there had been numerous calls to him about the completion of it; that he talked to the Faulkner's about the money and what was due and owing and what was done, and eventually agreed that he would refund to them -- to the Faulkner's at least $4,000.00 -- that that much that amount at any rate had not been spent on the repairs and remodeling -- that was agreed to. The statute requires

PAGE 33

states in part:

"Any contractor or sub-contractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any

[The Court]: part therefore, of any payment made to him, for any other purpose than to first pay laborers, subcontractors and materialmen, engaged by him to perform labor or furnish material for the specific improvement, shall be guilty of a felony in appropriating such funds to his own use..."

and they -- the argument of Defense Counsel is there is no proof that he appropriated these funds to his own use. However, I think the reasonable inferences are that he did appropriate the funds to his own use. He originally agreed to do the project in September of '84 and as of december of '85 it had not been completed. He had made or given no explanation for not doing it. Eventually he agreed that at lease [least] $4,000 he would refund to the Faulkner's. I think the reasonable inference is that he used at least that amount for his own use.

PAGE 33 continued

[The Court]: And People -vs- Miller dealth [dealt] with a similar situation, albeit in that case the Court felt that the bank records indicated clearly that the Defendant had used funds given [to] him by the person with whom he contracted. But it seems to me here that likewise the inference can be drawn that this Defendant used for his own use and not to

PAGE 34

pay contractors or materialmen or laborers for work on this job when he acknowledges at least $4,000 he had that he had not used on the job. And the Miller case seems to me dealt with that theory and discussed the state in detail and said -- on page 341:

"The more important question centers on defendant's interpretation that there can be no violation of the at where no

[The Court]: materialmen or laborers are 'unpaid'. Essentially defendant's interpretation would allow a contractor to do anything he wished with a customer's money so long as the contractor was not legally obligated to pay any laborers, subcontractors or materialmen. Such an interpretation would undermine both the purpose and express language of the statute."

on page 343 in that same opinion the Court of Appeals noted:

"Because the building contract fund act is a remedial statute, designed to protect people of the state from fraud in the construction industry, we construe it liberally for the advancement of the remedy. People v Bundy, 35 Mich App 53, 57; 192 NW2d 115 (1971). In light of the statutory purpose and the statutory language referring to future obligations of the contractor, we hold . . .

Page 57

. . . guess you could say you work out of your home.

Q. [Mr. Saunders] Is there an office that you go to to do calls?

A. [Mr. Faulkner] There is a central office, yes, in --

Q. You do some work out of your home as well?

A. Yes.

Q. Spend more time at home or at the office?

A. In the field.

Q. You said that's how you first met Douglas Dwight Bennett?

A. Yes.

Q. Do you remember what year you first came to contact with him?

A. Well, '80 or '81.

Q. Now, I would like to direct your attention to the fall of 1984, and ask you

were you interested in making some changes to your house at that time?

A. Yes.

Q. Tell the jury what you were interested in doing at that time?

A. We needed to make a bedroom on the first floor for our wheelchair daughter that was 13 at the time in a wheelchair, and being that the second floor with the chair lifts. And then we also needed a business office and a deck for outside the family room, plus a whirlpool bath for the adopted daughter.

Page 58

Q. Now, I'd like to direct your attentions specifically to the month of September of 1984. Now, in that month did you go about trying to get a contract for that work?

A. Yes, I did.

Q. Explain to the jury how that procedure went for you? What exactly did you do to get this job done?

MR. BENNETT: I object to that, Your Honor, the issue of the contract.

THE COURT: Do you want to stand and state the legal basis of your objection?

MR. BENNETT: Yes. The objection to the contract that the prosecution is now involved with was entered into a civil matter. This is a criminal matter.

THE COURT: What's wrong with the question he asked? That's what you're objecting to?

MR. BENNETT: The questioning he is about to bring forth is that it violates my Fourth, Fifth and Fourteenth Amendment rights to the Constitution of the United States, that it was a civil action with this contract. This is criminal. The Court -- the People brought the charges against the Defendant bases primarily on a case --

Page 58 continued

THE COURT: But what is the legal basis for your objection?

Page 66

A. [Mr. Faulkner] When he gave me the quotation on the job.

Q. [Mr. Saunders] The thing you have in your hand?

A. Yes.

Q. Does that document there set forth that $8,000 down payment?

A. Yes, it does.

Q. Did Mr. Bennett tell you why he needed $8,000 as a down payment?

A. Yes, to start buying the materials.

Q. What exactly did he tell you that you recall?

A. I don't recall exactly what he -- it was just that he needed the down payment to start the job which is a normal thing to do.

Q. Were you able to give him the money?

A. Yes.

MR SAUNDERS: Your Honor, the Record should reflect I am showing the Defendant what's been marked as People's Proposed Exhibit No. 2 and 3.

MR. BENNETT: It just barely shows that a check was issued to --

THE COURT: He's just showing it to you.

MR. BENNETT: Yes.

MR. SAUNDERS: May I approach the

witness, Your Honor?

THE COURT: Yes.

Q. **(CONTINUING BY MR. SAUNDERS)** Now, Mr. Faulkner, I'm handing you what's been marked as People's Exhibits -- Proposed Exhibits No. 2 and 3, and I ask you if you recognize those?

A. Yes

Q. How do you recognize those?

A. The checks I made out.

Q. How do you know you made them out?

A. Because I signed them.

Q. Okay. And is that your writing on them?

A. Yes, it is.

Q. Who did you make those checks out to?

A. Doug Bennett.

Q. And what was the reason you made out those particular checks?

A. As a down payment for -- deposit for the job to be completed.

MR. SAUNDERS: Your Honor, I would move for admission of both People's Proposed Exhibits 2 and 3.

MR. BENNETT: I object at this time, Your Honor. It is also in violation of my Fourth, Fifth and Fourteenth [Amendments]. It's more civil than criminal. This is a . . .

A. [Mr. Faulkner]: we became very concerned that we might be taken in a fraud.

Q. [Mr. Saunders]: and what did you do in response?

A. On December 7, 1984, we gave a certified letter and sent it to Mr. Bennett.

MR. SAUNDERS: Your Honor, the Record should reflect I'm showing what's been marked as People's Proposed Exhibit No. 5 to the Defendant.

May I approach the witness, Your Honor?

THE COURT: Yes.

Q. (CONTINUING BY MR. SAUNDERS) Mr. Faulkner, I'm handing you what's been marked as People's Proposed Exhibit No. 5, and I ask you if you recognize that?

A. Yes, I do.

Q. Tell the jury what that is?

A. Pardon me?

Q. Tell the jury what that is that I gave you?

A. This is a certified letter to Mr. Douglas Bennett in response to the construction work.

Q. Okay, I'm sorry, I didn't hear you. Did you say from Mr. Bennett to Mr. Bennett.

A. To Mr. Bennett.

Q. Who wrote that letter?

A. I did.

Q. How do you know that's the one you wrote?

A. Well, I wrote the letter and my daughter typed it.

Q. Did you sign it?

A. Yes, I did.

Q. Is that your signature on there?

A. Yes, it is.

MR SAUNDERS: Your Honor, I wold move for admission of People Proposed Exhibit No. 5 under 901.

MR. BENNETT: Object to that being entered, Your Honor, there's no foundation to suggest that I received the letter. The signature on it is my wife's.

THE COURT: Overruled. The Court will receive it as evidence.

Q. (CONTINUED BY MR. SAUNDERS) Mr. Faulkner, what's the date of that letter, please?

A. December 7th of '84.

Q. And you said your daughter typed it?

A. Yes.

Q. Who composed it?

A. I did.

Q. What does it say briefly without reading it? What exactly were you conveying in that letter?

A. That we were disappoint in the quality -- or the quantity of the amount of work that he was doing. And . . .

MR BENNETT: Your Honor, I only have one objection to it, in that that it should state on the agreement --

THE COURT: He's only showing it to you at this time.

MR. BENNETT: Yes, but I have the objection to it.

THE COURT: Well, he hasn't done anything with it except give you the courtesy of seeing what he's gong to now use.

MR. BENNETT: Could you read in full length in text?

MR. SAUNDERS: May I approach the witness, Your Honor?

THE COURT: Yes.

Q. (CONTINUING BY MR. SAUNDERS) Mr. Faulkner, I hand you what's been marked as People's Proposed Exhibit No. 6 and I ask you if you recognize that?

A. What's your question?

Q. Do you recognize that?

A. Yes.

Q. Tell the jury what that is, please?

A. That's a statement to complete the job or to return the money.

Q. Is that the statement that you were just telling me

about that you made up when he came over to your house?

A. Yes.

MR. BENNETT: I object, Your Honor, it leaves a false impression as to the money. He should state fully that it says the part of the money that was not used.

THE COURT: Continue.

Q. (CONTINUING BY MR. SAUNDES) At this time, let me ask you this. Who wrote out that?

A. I did.

Q. And who signed it?

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A. Douglas Bennett; witness, Ryan Faulkner.

Q. Did anyone else beside Ryan Faulkner witness that?

A. Not my handwriting -- my wife was in the room.

Q. Were you in the room?

A. Yes.

Q. Did you see him sign it?

A. No, I did not sign it.

Q. No, I'm sorry, did you see him sign it?

A. Yes, I did.

Q. Did you see him sign it?

A. January 8th, '85.

Q. You saw him sign that?

A. Yes.

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... of part of the deposit monies paid 10/4 of '84. Signed Douglas Bennett 1/8 of '85.

Q. [Mr. Saunders] I'm sorry, what's the date on that?

A. 1/8 of '85.

Q. And it says that he will have it completed within three weeks?

A. That's correct.

Q. Did he complete it within three weeks.

A. No.

Q. Did he do any work after that letter, if you remember?

A. I believe, yes.

Q. What do you remember him doing?

A. Subcontractor to dig out a large hole where the patio was.

Q. And did they do that after that letter?

A. They did that before the letter.

Q. Did he do anything -- don't worry.

A. Okay.

Q. You just tell as much as you can remember, okay?

Page 87 continued.

A. Yes.

Q. Now, my question is --

A. It was before the letter, a week before the letter.

Q. AFter that letter, do you remember him doing anything more?

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Q. [Mr. Saunders] Did he give you that letter?

A. Yes.

Q. Did he make any statements about what that letter contained? Without reading it at this point, did he tell you why he was giving you that?

A. I don't understand the question.

Q. Did he tell you why he was giving you that letter at all?

A. Yes.

Q. Why did he say he was giving it to you?

A. He was telling us of his cost and subcost of what was done so far.

MR. SAUNDERS: Your Honor, I would move for admission of People's Proposed Exhibit 7, under 801D2.

MR. BENNETT: I have no objectins other than what I've stated.

THE COURT: Received.

Q. (CONTINUING BY MR. SAUNDERS): Mr. Faulkner, would you explain to the jury the specifics of what that has on it? Tell them what is says there?

A. Various prices of purchases and subcontractors who have worked on it.

Q. Does it list the prices of the things done?

A. Yes.

Q. Does it have a total of the amount spend?

[Bennett] addition within the Defendant's home, correct? That's what you stated to the Court?

A. [Mr. Faulkner] Would you repeat that, please?

Q. You contacted the Defendant at his home in regards to having this addition built; is that correct?

A. Yes.

MR. SAUNDERS: Your Honor, I'm sorry, just for simplicity, I have no problem. If he wants -- he doesn't have to say the Defendant, if he wants to say me to make it easier for all [of] us to understand. I have no problem with that.

MR. BENNETT: Okay, fine, would I be all right or something other than the Defendant?

THE COURT: Ask you questions.

Q. (CONTINUED BY MR. BENNETT) Mr. Faulkner, how long have you known Mr. Bennett, the Defendant?

A. Since 1980 or '81.

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Q. So you could say that we had a casual relationship rather than business, couldn't that be assumed?

A. Yes.

Q. And I know you as an individual.

THE COURT: Well, you're asking him questions, not giving testimony yourself.

MR. BENNETT: Yes, well, that's what I'm leading up to, Your Honor.

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Q. (CONTINUED BY MR. BENNETT) Yes or no?

A. [Mr. Faulkner] I believe you do more than that.

Q. And how is that in regards to what type --

A. For the type of blueprints that I saw in your home were not just cement contracting.

Q. Couldn't they be mistakenly identified as subdivisions for homes located in subdivisions?

A. I didn't understand your question.

Q. Couldn't those prints be subdivisions of homes where I have to bid on the cement work for curbing?

A. I don't know.

Q. So it could be a misconception on your part?

THE COURT: He said he didn't know.

Q. (CONTINUING BY MR. BENNETT) When you gave the Defendant this money, did you advise the Defendant that this money has to go in a separate fund?

A. No.

Q. Did you know of this building trust fund when you gave the Defendant his money?

A. No.

Q. Then how can you, Mr. Faulkner, say if I was not advised of it, what I should do with this money?

MR. SAUNDERS: Your Honor, I object. Mr. Faulkner doesn't have to say anything.

He doesn't have to know anything about this law. The fact of the matter is there's a law and we allege that he broke the law and it was nothing to do with what Mr. Faulkner knew or did not know.

THE COURT: Well, the question is infirm in it [its] form. And he was asking the witness what he knows and then the question is as posed by the Defendant, what the Defendant knows which isn't --

MR. BENNETT: When the issue -- excuse me.

THE COURT: So I sustain the objection to the form of the question.

MR. SAUNDERS: I ask that the subject be changed, Your Honor, move onto some other subject for the reason that I stated as well.

THE COURT: The questions infirm in the way posed, so I have to wait for another question.

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Q. (CONTINUED BY MR. BENNETT) On appeal by Miller, the Court of Appeals --

THE COURT: Well, ask a question. We need a new question, sir.

MR. BENNETT: We need a new question with regards to building --

THE COURT: We need a question.

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THE COURT: Well, when you assume your own defense and you assume it within the rules of the trial out of fairness for the trial scene itself. So ask a question.

Q. (CONTINUING BY MR. BENNETT) Of the work that was performed at your house, are there any liens against your house at this time?

A. [Mr. Faulkner] I didn't get the last part of the question.

Q. The work that was perform by the Defendant were there any liens attached to your property for this work that was performed?

A. I don't know.

Q. Have you been notified of any liens [that have] been filed against your house for nonpayment?

A. No.

Q. The Defendant did do quite extensive work to your property, correct, as far as like you've indicated taking the brick off the house, removing the patio?

A. No.

Q. Digging out the crawl area.

A. No.

Q. And the footings. Did the Defendant do that or --

A. He did not do extensive work, no.

Q. Did the Defendant dig the footings for the addition?

A. Yes.

Q. Did he dig the crawl area for the addition, that three foot area that had to be dug out?

A. Yes.

Q. Did the Defendant have block delivered to that job?

A. Yes.

Q. Did the Defendant have trusses delivered to that job?

A. Yes.

Q. Were you ever advised by any of the companies that Mr. Bennett employed -- subcontractoed that money was still owed?

A. I'm not aware of it.

Q. You also indicated to the Court that you obtained the building permit. Was there anything in the contract you had with the Defendant that indicated that he would obtain the building permit.

A. You mean in the quotation?

Q. Yes.

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A. No.

Q. You stand to gain by the Defendant constructing the addition, correct?

A. I don't understand your question.

Q. In other words, the price I quoted you is much lower than that of a licensed contractor, correct?

A. Not much lower, but some amount lower.

Q. Enough to --

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A. Pardon me?

Q. Enough to be adequate, correct, as far as you're going [to] wind up with a savings on it. You've indicated to the Court that work stopped. Could you tell the Court why and who you were ordered by to have this work stopped?

A. I'm not aware that we were ordered to stop work.

Q. Did not the City of Farmington Hills, by and through the building inspector, John T. Waid, notify you to cease all work due to the fact that --

A. I'm not aware --

Q. --the Defendant, the Sixth Circuit --

A. No.

Q. You're not aware of that?

A. I'm not aware that we were ordered to stop. You're the one who stopped.

Q. Did the building department ever notify you to cease operations?

A. I am not aware of the building department notifying me.

Q. You have an attorney named Samuel Gun, correct?

A. Yes.

Q. There's a Federal lawsuit pending in Federal Court on this issue, correct?

MR. SAUNDERS: I object, Your Honor,

. . . [Mr. Saunders] I don't see how it's relevant.

MR. BENNETT: What I'm getting at is the sixth Circuit Court --

MR. SAUNDERS: Okay, I've got to be able to finish my argument. I don't think it's relevant and I don't think -- it would be speculation. Mr. Faulkner isn't a lawyer that I know of and he should't know, and I don't think he does know what cases are pending in Federal court or in any other Court. So I would object.

Q. (CONTINUING BY MR. BENNETT) And you're not aware of any facts that the building inspector said that no further work to be done on the property and that Mr. Bennett is to be off the property due to the fact he does not have a builder's license. Are you aware of that fact?

A. The way that you state it now, yes.

Q. You are aware of the fact that the City order me off the property because I do not have a builders license?

A. Yes.

Q. Did the Defendant advise you that the work that progressed had to stop at that point per inspection of the footings by the City?

A. I'm aware that you were waiting for some inspections.

Q. ANd that I could not proceed until I got these inspections, correct?

A. I suppose.

Q. And it was the City not allowing me to lay the cement so I could continue with the work.

THE COURT: What's the question?

Q. (CONTINUING BY MR. BENNETT) The question is that; Are you aware of the fact

that I could not proceed any further until I was okayed by the City to proceed?

THE COURT: Aware, then or now?

MR. BENNETT: Then. The addition is already done.

THE WITNESS: I don't understand your question.

Q. Was it required that the footings be inspected before I was allowed to work on it?

A. I don't know.

Q. Were you ever advised of this?

A. I don't think so.

Q. By the City? You're under oath, Mr. Faulkner. I have a brief from the Sixth Circuit that say that --

A. Well, I don't know.

Q. -- John T. Waid notified you personally --

THE COURT: He answered the question.

THE WITNESS: I don't know.

Q. (CONTINUING BY MR. BENNETT) Is that your statement? Yes or no?

A. Yes.

Q. Yes, you were notified or no, you were not notified?

A. My answer to the question is yes, I don't know --

Q. Yes?

A. -- If I was notified.

Q. You don't know if you were notified; is that what you're saying. You don't know? Or yes, you were notified, or no you were not?

THE COURT: This is by the City?

MR. BENNETT: This is by the City. This is the building inspector.

THE COURT: Well, ask the complete question because I think it's getting argumentative.

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Q. (CONTINUING BY MR. BENNETT) Did the building inspector not advise you that Mr. Bennett was not to proceed on the addition because he did not have a builder's license, yes or no? Did the City advise you? You're under oath.

A. Yes.

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Q. So it was then understood that I could not proceed without the City properly inspecting the footings so I could proceed?

A. Because you needed a license.

Q. Well, no, I need the inspection.

THE COURT: Ask him a new question.

Q. (CONTINUING BY MR. BENNETT) I could not proceed because I did not have a license; is that correct?

A. I didn't understand your question.

Q. I'll go onto another question. The State is saying -- well, wait just a second.

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[Mr Bennett continuing] Did the Defendant offer to reimburse you for money not spent?

A. Yes.

Q. Why didn't you accept this offer?

A. You didn't give it to me.

Q. Well, I made an offer and I put the proposal to you, and I stated I was returning --

THE COURT: Well, you're making statements rather than asking questions.

Q. (CONTINUING BY MR. BENNETT) Why do you feel that the Defendant did not pay you this money back?

A. I don't know.

Q. Would you have accepted that money at that time?

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A. I don't know.

Q. Why didn't you take a civil action to recover it?

MR. SAUNDERS: Object, Your Honor, that's irrelevant.

THE COURT: Sustained.

MR. BENNETT: It leaves me in a position, Your Honor, where I'm --

THE COURT: Just ask a question. This is the time for cross-examination, not for argument.

Q. (CONTINUING BY MR. BENNETT) Would you have taken the offer if Mr. Bennett had the money?

THE COURT: He already --that's [that] question has been asked.

MR. BENNETT: And answered. Yes?

THE COURT: And answered. No, the answer was, "I don't know." But the question has been asked and answered. Well, ask a new question.

Q. (CONTINUING BY MR. BENNETT) Could you be more specific, yes or no?

THE COURT: He's already answered the question, "I don't know." That's the answer you got, sir. Ask a new question.

Q. (CONTINUING BY MR. BENNETT) Did you feel that you were entitled to additional money, other than --

were entitled to additional money, other than --

A. Yes.

Q. Why did you not raise those objections to the Defendant?

THE COURT: Well, then, you're asking a question that assumes a fact not in evidence.

MR. BENNETT: Your Honor, I'm in a position where the Defendant is saying one thing, I'm saying another.

THE COURT: Well, you haven't said anything yet, you're just asking questions.

MR. BENNETT: I know. That is the difficulty.

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q. (CONTINUING BY MR. BENNETT) You stated that you're a licensed day-care center.

A. I didn't hear you.

Q. Or a foster care, correct?

A. I did not understand your question.

Q. Are you licensed by the State of Michigan for foster care?

A. Yes.

Q. You have more than just you and your immediate family in the home?

A. I have one what?

Q. You have more than just you and your immediate family . . .

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Q. (CONTINUING BY MR. BENNETT) You were advised at one time by the City of Farmington Hills that Mr. Bennett couldn't proceed on this' is that right, couldn't proceed with the project?

A. I believe so.

Q. Do you remember when that was?

A. No.

Q. Was it before or after he wrote out that statement saying that he was going to pay you back the money?

A. Before.

Q. Besides writing that statement, did he ever give you any -- try to give you money?

A. No.

Q. Would you have accepted back the remaining money had he tried to give it to you?

A. I don't know.

Q. Why don't you know?

A. Because I believe the $4,000 work that he says that he did was very overly priced through research that I've done with other building contractors for their opinion of what the work that he's done that he jacked up the prices.

Q. All right. So let me see, maybe I'm not being clear. When I asked you if you would accept the money he set out there that he owed you, about $4,000,; when you

say you don't know, what do you mean, do you mean that you want more, or you wouldn't take any?

A. I feel that I'm entitled to the full $8,000 that I have him.

MR. SAUNDERS: I have no further questions, Your Honor.

RECROSS - EXAMINATION

BY MR. BENNETT:

Q. Mr. Faulkner, in regards to your statement as to attorneys' fees, could you clarify that for the Court? In regards to the amount of fee that you've had to pay an attorney, could you explain to the Court what that is?

A. I don't understand your question.

Q. You stated due to this action, you've incurred attorneys fees. Could you state for the Court what these fees are and what they are for?

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A. I don't understand.

Q. Are they related to the case now pending or the case in Federal Court?

MR. SAUNDERS: Your Honor, I have to object to any statements about a case or cases in Federal Court. That's not relevant. We're not here for cases in Federal Court. We're here for a crime and we've set forth that in the information. And he continues to bring up . . .

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DIRECT EXAMINATION

BY MR. SAUNDERS

Q. Would you state your full name and spell your last

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name for the Record, please?

A. Samual H. Gun, G-U-N, and my address is 24567 Northwestern Highway, Suite 1C,

Southfield, Michigan.

Q. And what do you do for a living, Mr. Gun?

A. I'm an attorney.

Q. Have you represented the Faulkners, James and Donna before?

A. Yes, I have.

Q. And did you counsel them with regard to a matter concerning Douglas Dwight Bennett?

A. I did.

Q. Would you describe for the jury briefly what your contact was in the whole situation?

A. Well, initially the Faulkners had come to my office just for an initial interview, presented this problem so I was given to understand before I met them regarding a building contract. They made an appointment, came in, told me some of the facts that they thought were important. I

recall that I had to review a number of handwritten notes, which I think the parties had intend as a contract. I honestly -- I Don't recall at this time, but I do recall that I did review everything that they did bring and researched it in terms of the possible alternatives that were available to enforce their

claim.

Q. You sound just like a lawyer.

A. It feels funny sitting in this box.

Q. What -- the Faulkners came to you with the problem?

A. Yes, they did.

Q. Briefly, what was the problem?

A. They had a builder commence a project as of the time they came to me. They were unable to reach him or contact him for follow up or questions or even progress

reports. And then ultimately, we discovered that the builder was unlicensed and that changed some of the alternatives that were available at the time.

Q. Did you ever meet this Mr. Bennett in person?

A. No.

Q. Other than today which you -- I want to put it a different way --

A. I've seen Mr. Bennett before.

Q. In other circumstances, but did you know him at the time at all that you dealt with -- represented the Faulkners/

A. No. At the time that the Faulkners came in for their initial consultation I had never met Mr. Bennett nor had I ever heard of him.

Q. Now, did you attempt to contact Mr. Bennett about the problem?

A. I believe I did. If i'm not mistaken, I probably

sent him a letter. Typically, I wouldn't call any prospective Defendant in any case just out of processional propriety. I generally send a harmless letter by way of introduction and offer him an opportunity to contact my office to further discuss it. Thereafter, if there's a breakdown, I take other actin.

MR. SAUNDERS: The Record should reflect that I'm showing what's been marked as People's Proposed No. 8 to the Defendant.

MR. BENNETT: It was sent to Douglas Bennett.

THE COURT REPORTER: I didn't hear you.

MR. BENNETT: It was sent to Douglas Bennett. I see no acceptance of the letter.

THE COURT: Did you have a chance to review the Exhibit, sir?

MR. BENNETT: Yes, I did.

MR. SAUNDERS: May I approach the

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witness, Your Honor?

THE COURT: Yes.

Q. (CONTINUING BY MR. SAUNDERS) Mr. Gun, I'm handing you what's been marked as People Proposed No. 8, and ask you if you recognize that and look at all the . . .

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A. [Mr. Sovay with National Bank of Detroit] The cashier's check is date October 9, 1984.

Q. [Mr. Saunders] Do your records indicate what was done with the cashier's check?

A. The cashier's check, i really can't testify as to Comerica's records, but it was either cashed or deposited.

Q. But you don't have any indication through your records?

A. No, sir.

MR. SAUNDERS: one moment, Your Honor.

I have no further questions, Your Honor.

MR. BENNETT: I have no questions, except the objection to which I've already stated for the Court, in violation of my Constitutional rights. I wish it be suppressed, the Exhibits as well as the testimony.

THE COURT: Are there any questions by the jury panel for this witness?

(Negative response)

THE COURT: There's a Motion to Suppress. I don't know what it is you want to supress, but in any event --

MR. BENNETT: Suppress the . . .

MR. SAUNDERS: Your Honor, the People would call Audrey Steinhoff to the stand.

A U D R E Y S T E I N H O F F

after having been first duly sworn by the Clerk of the Court at 2:20 p.m., was examined and testified on her oath as follows:

MR. BENNETT: Your Honor, I'll object at this time. The witness that the prosecution is now bringing before the Court is not a party to the action, knows nothing of a first-hand account of the action. Therefore, it puts the Defendant in jeopardy underneath his Sixth Amendment rights to the US Constitution to a fair trial.

MR. SAUNDERS: Your Honor, I cite for the Court Michigan Rule of Evidence 404B,

which allows evidence of other wrongful conduct to be used in a trial to show, among other things, intent. There's an issue here with regard to intent to defraud. I'm calling Ms. Steinhoff to show -- to have testimony with regard to another incident involving Mr. Bennett to prove an intent to defraud under 404B.

MR. BENNETT: Your Honor, I'll further object and state the case of People versus Sadler, where the prosecution, Greg Weir, at that

time, brought a witness of a prior conviction before the Court. The Court of Appeals ruled and g ave the Defendant a new trial.

THE COURT: Objection overruled.

MR. SAUNDERS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. SAUNDERS:

Q. Mrs. Steinhoff?

A. Yes.

Q. Can you hear me?

A. Yes, I can.

Q. Would you state your full name and spell your last name for the Record, please?

A. Audrey J. Steinhoff, S-t-e-i-n-h-o-f-f-.

Q. Would you tell the jury where you live, Audrey?

A. I live [at] 3545 Union Lake Road, Walled Lake, Michigan.

Q. Did you live at that address on June 8th, 1984?

A. Yes, I did.

Q. And who did you live with at that time?

A. My husband.

Q. Anyone else?

A. Family.

Page 5 continued

Q. And at that time in 1984, did you make an agreement with a Douglas Dwight Bennett to do some work for you?

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THE COURT: Yes, you're not here to make any argument. That's right. Now, if you hired him in the interim, that's your business.

MR. HALL: Well, Judge, it might be quicker then. I don't have any problem with making argument.

THE COURT: Lots of things would have been quicker, but the Defendant has a right to represent himself, just as long as he knows his right to be represented by counsel. He has not made a request for a court-appointed attorney knowing full well that he has a right to a Court-appointed attorney in this matter. And the Court on its own Motion appointed counsel to sit with you to answer any questions you have. So that's where we are.

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MR. BENNETT: No, I'm not --

MR. HALL: But, Judge, if you would, I'm prepared to argue his Motion to Dismiss and, if the Court will permit me, I'll go forward. He just has one witness to call. I'll ask that witness a few questions.

THE COURT: He's representing himself.

MR. BENNETT: I'll waive that.

THE COURT: You can't. You're . . .

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[The Court] . . .issue of the attorney settled. You may want to hire him, but I want to hear from counsel whether or not there is an arrangement, and whether or not he accepts the representation, or whether he is to continue under the Court's Order in the role that he's presently assigned.

MR. HALL: Your Honor --

THE COURT: It's up to you.

MR. HALL: I believe Mr. Bennett should continue to represent himself. That's just

my --

THE COURT: All right. So you don't accept any active representation of him at this time and you're acting as the Court-appointed attorney just to confer with him and counsel him when need?

MR. HALL: Yes, Your Honor.

THE COURT: All right. Let's have your Motion then.

MR. BENNETT: Your Honor, then I may proceed with my Petition for a Directed Verdict for Acquittal at this time?

THE COURT: Go ahead.

MR. BENNETT: Your Honor, at this time, the Defendant Petitions for a Directed Verdict of Acquittal. The first issue is that of the Statute of the Building Trust Fund. It is a

legislative law, and therefore, the Defendant cannot be held liable unless the Defendant was first forewarned of this law.

Under cross-examination by the Defendant, Douglas Bennett, Mr. James Faulkner was asked if he personally warned Mr. Bennett of this law, and how the money of this down payment was to be used. Mr. Faulkner indicated he did not advise Mr. Bennett of the consequences if he failed to respond properly.

The second issue is that -- the second issue that the Defendant will raise, does the building trust fund apply to a person who is not a subcontractor or a general contractor? Prosecution has failed to prove whether the Defendant is a genereal contractor or a subcontractor.

Mr. Faulkner came to the Defendant, Douglas Bennett, asked the Defendant to bid on his proposed addition. There is nothing to signify that the Defendant is a residential builder. On that, the Defendant built several additions to his own home, which he has the right to

Page 20 continued

underneath a homeowner's permit and that the Defendant helped his neighbors in their remodeling of their homes which Mr. Faulkner has already testified to.

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[Mr. Bennett] . . . Faulkner's addition. The prices that were charged were fair and just. The prosecution has failed to prove otherwise.

The sixth issue is that of the remaining money that Faulkner gave to the Defendant, Douglas Bennett. Mr. Bennett was more than willing to refund the balance to Mr. Faulkner. Mr. Faulkner refused to do so.

The seventh issue is that of failure -- is that a failure to represent -- failure, that is the seventh issue is that a failure to represent that the Defendant claimed to be a licensed contractor. There is no evidence, circumstantial or otherwise that the prosecution has brought before this Court to state that the Defendant is

an unlicensed builder.

The prosecution has failed to prove that the Defendant derives most of his income form that of being a licensed contractor, which he is not.

The Defendant claims he is a cement contractor. Mr. Faulkner came to Mr. Bennett and asked him as a friend to do this construction to his house. Mr. Bennett agreed to do this. Mr. Bennett advised Mr. Faulkner he was not a licensed

contractor and he would have to take out the necessary permits.

I feel at this point, the prosecution has failed to prove its case, directly or indirectly. That there is no evidence to prove that Mr. Bennett did violate the Building Trust Fund Act for it only applies to contractors and subcontractors. The prosecution has failed to prove otherwise that Mr. Bennett is a licensed contractor. So, therefore, at this time, I wish to move

for a Directed Verdict of Acquittal.

MR. SAUNDERS: Your Honor, I would ask the Court to deny his Motion. Many of his argument I don't think really go toward the Directed Verdict, but may be appropriate in closing argument.

Just briefly, his final -- what hits my mind the most is his final argument that I failed to prove that he was a licensed contractor. I'm not trying to prove that he was a licensed contractor. I'm not trying to prove that he was a licensed contractor. He's charged with not being a licensed contractor. I hope I have been successful in failing to show that he was licensed.

Just briefly, a mistake of law is not a defense, Your Honor. He's bringing up the fact that he didn't know about the crime that is involved here. There's no obligation on the --

THE COURT: Well, this isn't the

point in the proceedings for the defense. It's whether the people have sustained their burden of proof to show a prima facie case in the evidence.

MR. SAUNDERS: Yes, Your Honor, and I believe that we have sustained our burden. We've shown that there was -- we had some evidence to show that there was a contract, and in that contract, he was given funds for the purpose of getting labor and materials to do the project, that he did not first use that deposit to do that, to get materials and labor to finish the contract. We had testimony and an Exhibit to show that he, in fact, admitted that, that he owed money back. And also testimony will show that he never paid the money back.

Also, your Honor, the Exhibits include a contact that was made out for the construction, and based on that I believe that we've established our burden of

showing the prima facie case, and I ask that his Motion be denied.

THE COURT: Motion denied. We're ready for the jury.

MR. SAUNDERS: Could we just see which witnesses Mr. Bennett has in here. There may be one who hasn't --

MR. BENNETT: No, Mr. Shinavard is here.

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MR. SAUNDERS: Okay, so we have --

MR. BENNETT: Both witnesses are here.

THE COURT: Okay, let's go.

MR. SAUNDERS: Thank you, Your Honor.

(Whereupon the jury returned to the courtroom, after which the following proceedings were had.)

THE COURT: All right. Ladies and gentlemen, we're ready to continue. I ask whether or not the Defendant wishes to call any witnesses?

MR. BENNETT: Yes, I do, Your Honor.

THE COURT: All right. Call your witness.

MR. BENNETT: I wish to call my first witness, John T. Waid.

J O H N W A I D

after having been first duly sworn by the Clerk of the Court at 3:35 p.m.., was examined and testified on his oath as follows;

DIRECT EXAMINATION

BY MR. BENNETT:

Q. Could you please state your full name for the Court?

A. John T. Waid. It's W-a-i-d.

Q. And your place of employment?

A. City of Farmington Hills.

Q. How long have you -- what do you do as --what do you do at the City of Farmington Hills?

A. I'm the building official.

Q. how long have you been a building inspector for the City of Farmington Hills?

A. Over fourteen years.

Q. How did you first become acquainted with the defendant, Douglas Bennett, now before the Court?

A. My first acquaintance with Mr. Bennett was when he came into my office three or four weeks ago to copy some papers.

Q. Prior to that then could it have been one of the assistants that works under you, sir?

A. Possibly, yes. I've never met you before.

Q. Have you ever been out to the Faulkner residence?

A. No, I haven't.

Q. Didn't you state in the Sixth Circuit brief that you were?

A. No.

Q. What do you know of the proceedings now before the Court?

A. Not very much.

MR. BENNETT: Your Honor, there must

be a mix up because my --

THE COURT: Well, do you have any other questions for this witness?

MR. BENNETT: No, I'm addressing the court that this witness --

THE COURT: Well, are you through questioning this witness?

MR. BENNETT: Apparently, I've subpoenaed the wrong person.

Q. (CONTINUING BY MR. BENNETT) Could you tell me which associate dealt with Mr. Bennett?

A. Pardon?

Q. Could you tell me which assistant of your dealt with Mr. Bennett?

A. I can't say for sure, but I think Mr. Floyd mean (phonetic) was out there. I can't say for sure, but I that's the gentleman that was on the job. This happened some time ago.

Q. Correct.

MR. BENNETT: Your Honor, there's a problem that I've just become aware of.

MR. SAUNDERS: Well, Your Honor, if he has an argument for the Court, I would ask that it be made outside the presence of the jury.

THE COURT: Do you have any more

questions for this witness?

MR. BENNETT: He is of no value to me at this time, Your Honor.

THE COURT: So the answer is no, you have no further questions.

MR. BENNETT: I have no further questions, but I wish to make an argument before the Court.

THE COURT: Well, then, if you have no further questions, this is the time for the prosecutor to ask his questions.

CROSS-EXAMINATION

BY MR. SAUNDERS

Q. Mr. Waid, have you dealt with Douglas Dwight Bennett before?

A. Only on that one occasion he came into my office to request some copies of some records which was several weeks ago, maybe six weeks ago.

Q. The person who was just questioning you, is that the person who came in?

A. Yes.

MR. SAUNDERS: Your Honor, the Record should reflect an identification of Mr. Bennett.

THE COURT: Yes.

Q. (CONTINUING BY MR. SAUNDERS) Did he ever indicate to you whether he was a licensed contractor or not/

A. No.

Q. Do you have any idea if he was or not?

A. No.

Q. Do you have any idea if Mr. Bennett

has ever work on other constructin projects in your community?

A. No.

Q. Is it possible that he did?

A. It's possible, yes.

MR. SAUNDERS: I have no other questions, Your Honor.

REDIRECT EXAMINATION

BY MR. BENNETT:

Q. Mr. Waid, do you have the file on the Faulkner case with you?

A. No.

Q. Are you familiar with the file on the Faulkner case?

A. Not too much. I think I have it in my office an application signed by one of the Faulkners to put an addition on their, I assume, their residence on Westcott Crescent Court.

Q. Could you explain to the Court in detail what you know of this proposed addition?

Page 29 continued

A. Like I said earlier, I don't know very much about it.

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I know there's an application made in the Faulkners' name to put an addition on.

Q. Did Mr. Floyd Mead contact you in reference to stopping work at the Faulkners' addition?

A. I don't recall that.

Q. And this is the only facts upon which you're acquainted with at this time regarding this case?

A. My knowledge about this case is very limited.

MR. BENNETT: I have no further questions.

MR. SAUNDERS: I have no questions.

THE COURT: All right. Any members of the jury panel have a question for this witness? All right. You may step down. You're excused. Thank you.

THE WITNESS: Excused for the day?

THE COURT: You're excused from this case. I don't know what the rest of the day holds for you.

Any other witnesses?

MR. BENNETT: Yes, I'd [like] to call Mr. Ernie Shinavard to the stand, please?

THE COURT: Do you want to step forward, sir, and raise your right hand to take an

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oath?

E R N E S T S H I N A V A R D

after having been first duly sworn by the Clerk of the Court at 3:40 p.m., was examined and testified on his oath as follows;

DIRECT EXAMINATION

BY MR. BENNETT:

Q. Would you please state your full name for the Court?

A. Ernest John Shinavard.

Q. And who are you employed by?

Page 31 continued

A. Oakland County Road Commission.

Q. And how long have you been employed at the Oakland County Road Commission?

A. Since 1967.

Q. How long have you known the Defendant now before this Court, Douglas Bennett?

A. A little over ten years.

Q. How did you get to know the Defendant?

A. He installed curbs on a number of projects that I was the project engineer for in new subdivision construction.

Q. And to the best of your knowledge, the Defendant has been doing this from then until the present date, correct?

A. From late in the construction season of 1978 through . . .

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[Mr. Bennett] . . . certain specification set forth.

THE COURT: That's a legal issue. Do you want to ask him a question concerning the facts of this case?

Page 33 continued

Q. (CONTINUING BY MR. BENNETT) The only regulation in the installation of concrete curbing is that which is set forth by the State, correct the guidelines?

A. The Oakland County Road Commission has various standards and specifications. We also utilize MDOT standards and specifications, Michigan Department of Transportation.

Q. Has the Defendant successfully followed these guidelines?

A. The curbing that has been installed on the projects I have jurisdiction over has met the minimum requirements of the Oakland County Road Commission.

Q. You speak of this minimum requirement, I'm going to rephrase this. Are you allowed to state any further than the minimum requirements when asked for a reference?

A. We do not give references for contractors.

Page 33 continued

Q. So what you would say is if anyone else had called for a reference, you would state the same that it meets the minimum requirements?

A. That's correct. I would state that the work that had

Page 34

been done for the Road Commission appeared to meet the minimum requirements of the Road Commission.

Q. Through the busy season, weather permitting, there have been several occasions where the Defendant has proceeded from seven o'clock till ten thirty at night; is this true?

A. I really couldn't say. I'm not on the job all the time. Normally, our inspectors are out there during the actual installation of the curb.

Q. Could you briefly tell the Court what preparation is needed for the installation of this curbing, ground conditions?

A. The ground has to be properly prepared on an acceptable subgrade, forms have to be set, and the reinforcement steel has to be properly placed between the forms. The ground has to be compacted and the curb concrete has to be placed between the forms and properly finished off to the contour that is required.

Q. The normal season is from when to when?

A. Normally, construction season will begin somewhere around April and will extend normally into November.

MR. BENNETT: I have no further questions.

MR. SAUNDERS: Just briefly, Mr.

Shinavard.

CROSS - EXAMINATION

BY MR. SAUNDERS:

Q. You don't know what Mr. Bennett was doing other than these projects for you, do you?

A. No, sir.

Q. You don't know what other side projects he might have been involved with?

A. No, sir.

Q. Or any other contracts he might have made with anybody else, do you?

A. No, sir.

MR. SAUNDERS: I have no further questions, Your Honor.

MR. BENNETT: I have no further questions.

THE COURT: Any questions by any members of the jury for this witness? All right. You may step down. Thank you very much. And you're excused from the subpoena.

Call your next witness.

MR. BENNETT: I have no further witnesses at this time, but I wish to make a statement before the Court without the jury present, if I may...

APPENDIX E

The statement made by Mr. Waid in his appeals brief states: "The initial complaint further asserts that shortly after the work on the addition was commenced, appellee City of Farmington Hills and its employee, appellee Waid, found out that appellant was not a licensed contractor. That the City of Farmington Hills disallowed any additional work on the project by the appellant and that appellees City of Farmington Hills and Waid advised Appellees Faulkner that Appellant was an unlicensed contractor and to not allow Appellant to continue any work on the addition."

The quote was taken from the appeals brief of the Appellees City of Farmington Hills and John T. Waid, joined with this exhibit are the signatures of the attorneys of record for the City of Farmington Hills and John Waid. Joined is the sworn statement that a true copy was mailed to the parties in the above entitled action.

Supreme Court, U.S.
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(3)

No. 91-2055

In The

Supreme Court of the United States

October Term, 1992

DOUGLAS DWIGHT BENNETT,

Petitioner,

-vs-

THE STATE OF MICHIGAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

Petitioner was charged with Fraudulent Detention or Use of a Building Contract Trust Fund contrary to MCL 570.152 and with being an Unlicensed Contractor contrary to MCL 339.601. Following a jury trial Petitioner was convicted of both the above charges.

Petitioner was sentenced to fines, cost and restitution or, in the alternative, six months in jail and three months in jail on the respective convictions.

The testimony at the trial established that Petitioner agreed to build an addition for the homeowner, John Faulkner. Petitioner prepared a contract, listing the cost of the construction and materials as $20,000.00. Petitioner received $8,000.00 from the victims to buy materials. (T, 65.) Two checks were made out to the Petitioner for $1,000.00 and $7,000.00 on October 4, 1984 and October 8, 1984, respectively. The checks were drawn on Account Number 64-777315 at the National Bank of Detroit. (T, 69-70.) Both checks were cashed by

the Petitioner and used for a cashier's check made out to the Petitioner. (T, 158.)

After beginning work on the project, Petitioner began to abandon the project. When confronted by the victim about having a building permit as required by the City, Petitioner told the victim that they should go together to City Hall. On the way to apply for the permit the Petitioner told Mr. Faulkner that he was not a licensed builder. Further, he had no time to take the necessary steps to obtain his license so that it would be better if the homeowner applied for the permit.

Mr. Faulkner then did apply for a permit but never received the permit. The work became slower and slower, with the Petitioner showing up for an hour and then disappearing. Numerous phone calls were made to the Petitioner, but he never returned any of the calls. (T, 75-76.) Finally, the Faulkners sent a certified letter to the Petitioner on December 7, 1984. Shortly thereafter, there was a meeting at the Petitioner's house where the Petitioner claimed he had problems with the permit. (T, 83.) A second meeting was held between the Petitioner and Mr. Faulkner. At this meeting, the Petitioner promised to complete the job in three weeks or to return the victim's money. This agreement was reduced to writing and signed by the Petitioner. At the trial the agreement was admitted as an exhibit. (T, 84-86.)

While these meetings were taking place, the victim went to City Hall to see if any permits had been pulled. No plans or permits were found. (T, 80.)

Petitioner gave Faulkner a list of the cost of items he had used and material supplied. This, according to the Petitioner, totalled $4,003.00. The Petitioner also told Faulkner that he would refund $4,400.00. (T, 91.) Although, Petitioner never returned any of the money. (T, 92.)

There was testimony that inquiry was made with the State Board of Licensing and Regulation. No record could be found of a builder's license ever having been issued to a builder named Douglas Dwight Bennett.

Petitioner was subsequently convicted by a jury and sentenced. Petitioner appealed as of right to the Michigan Court of Appeals. The Court of Appeals affirmed Petitioner's conviction and sentence. The Michigan Supreme Court denied leave.

REASONS FOR DENYING THE WRIT

I.

THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE OF A LACK OF A FEDERAL QUESTION.

Petitioner concedes that "the statute sets forth specific activities deemed criminal, which are easily comprehended by someone in the building construction business." (Petitioner's Writ, p. 19.) The Michigan Court of Appeals, relying on *People* v *Miller*, 78 Mich App 336; 259 NW2d 877 (1977), found:

> After reviewing these provisions, it is apparent to us that the act requires that monies received for a construction project be expended for that project and that any monies paid to a contractor be held in trust for that purpose. Clearly, use of the money for purposes not mentioned in the act would expose the contractor to a criminal penalty. We easily can agree that the act is not vague.

Miller, supra, followed the decision of *People* v *Herron*,[1] 68 Mich App 381 (1976). In *Herron*, it was noted

---

[1] ***Herron* did adopt the language from a Federal case. *Lanzetta* v *New Jersey*, 306 US 451; 59 S Ct 618; 83 L Ed 888 (1939). However, the court was not resting its decision on the federal case but merely using the case for guidance.**

that the provision must not be so vague that men of ordinary intelligence must guess at its meaning. The statute provides:

> Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefor, of any payment made to him, for any other purpose than to first pay laborers, subcontractors and materialmen, engaged by him to perform labor or furnish material for the specific improvement, shall be guilty of felony in appropriating such funds to his own use while any amount for which he may be liable or become liable under the terms of his contract for such labor or material remains unpaid, and may be prosecuted upon the complaint of any persons so defrauded, and, upon conviction, shall be punished by a fine of not less than 100 dollars or more than 5,000 dollars and/or not less than 6 months nor more than 3 years imprisonment in a state prison at the discretion of the court.
>
> MCL 570.152.

The statute provides notice and is easily comprehended.

In *Michigan* v *Long*, 463 US 1032, 1039; 103 S Ct 3469; 77 L Ed 2d 1201 (1983), this Court stated the test for whether a state court decision rested on adequate and independent state grounds as:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible [*1041] state law ground is not clear from the face of the opinion, we will accept

> as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only [***18] for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

This Court need not review this matter as the Michigan Court of Appeals has decided the matter based on the rationale of *Miller*, *supra*.

Even if this Court were to review the statute, Petitioner's challenge must be examined in light of the facts at hand. The challenge is not valid if raised by one to whom application of the statute is constitutional. *United States* v *Raines*, 362 US 17; 80 S Ct 519; 4 L Ed 2d 524 (1960). Petitioner is exactly the type of person the statute was enacted to protect against.

II.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW DISCRETIONARY ACTS OF THE PROSECUTION OR TRIAL COURT.

Petitioner contends that he could not be charged or convicted of being an unlicensed builder. However, Michigan statutory provisions provide:

> (1) A person shall not engage in or attempt to engage in the practice of an occupation regulated under this act or use a title designated in this act unless the person possesses a license or certification of registration issued by the department for the occupation.
>
> * * *
>
> (3) A person, school, or institution which violates subsection (1) . . . is guilty of a misdemeanor, punishable by a fine of not more than $500.00, or imprisonment for not more than 90 days, or both.
>
> MCL 339.601; MSA 18.425(601).

> "Residential maintenance and alteration contractor" means a person who, for a fixed sum . . . undertakes with another for the . . . laying of concrete on residential property . . . .
>
> MCL 339.2401(b); MSA 18.425(2401)(b).

Petitioner's actions fit the statutory definition.

Petitioner's issues III through VI all involve discretionary acts by the trial court. The decision to admit exhibits and evidence did not violate Petitioner's rights. *People* v *Watkins*, 176 Mich App 428; 440 NW2d 36 (1989); *People* v *Bates*, 91 Mich App 506; 283 NW2d 785 (1979). The directed verdict motion was properly denied as the evidence viewed in a light most favorable to the prosecution would allow a rational trier of fact to find Petitioner engaged in the construction business, that he retained payments meant for the payment of labor, material or subcontractors, while intending to defraud the victims. *People* v *Hampton*, 407 Mich 354; 285 NW2d 284 (1979), cert den 449 US 885 (1990).

Restitution is authorized under MCL 780.766(2). *People* v *Music*, 428 Mich 356; 408 NW2d 795 (1987).

Further, Petitioner has not met the requirements of Rule 14(K)(2) which refers to Rule 33(C) for the printing of briefs. Specifically, 33(C) requires the document to be printed on both sides of the page. Rule 33.7 provides that the clerk shall not accept for filing any document presented in a form not in compliance with this rule.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, the Respondent prays that this Honorable Court issue an order denying Petitioner's petition for a writ of certiorari to the Michigan Court of Appeals.

Respectfully submitted,

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DOUGLAS DWIGHT BENNETT,
Petitioner,

vs

THE STATE OF MICHIGAN,
Respondent.

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I Responding to the jurisdiction

The petitioner, through the trial and the two state appeals, raised the issue of Federal Question Jurisdiction.

All that is needed for Federal Question Jurisdiction is if a right or immunity can be asserted as basis for Federal Jurisdiction, and only if right is an essential ele-

ment to Plaintiff's claim by the constitution or laws of the United States. ID 5th Amendment to the United States Constitution. This issue was raised at trial and during both state appeals.

That after reviewing the respondent's brief on page 2, the respondent states:

> "Petitioner gave Faulkner a list of the cost of items he had used and material supplied. This, according to the Petitioner, totalled $4,003.00. The Petitioner also told Faulkner that he would refund $4,400.00. (T,91) Although, Petitioner never returned any of the money. (T,92."

This issue of the petitioner never returning any of the money is the sole issue for bringing charges against the petitioner. The trial transcripts clearly establish the fact that the petitioner did not violate the Building Trust Fund.

When James Faulkner was re-directed by Mr. Saunders, Vol. V, p. 113.

Q. (to Mr. Faulkner) Would you have accepted back the remaining money had he tried to give it to you?

A. I don't know.

Q. Why don't you know?

A. Because I believe the $4,100.00 that he says that he did was very overly priced through research that I've done with other building contractors for their opinion of what the work he's done that he jacked up the prices.

The issue of law is not in Faulkner's beliefs; the law only sets forth the restrictions, not Mr. Faulkner's beliefs, Peoples v Miller, 78 Mich. App. 336, No 5 & 6. A bill of cost was submitted (People's exhibit P.X. - 7. The District Court agreed on the cost and only the balance of the trust

was due. If Faulkner is to argue cost, this would be civil, not criminal, for it violates the petitioner's due process rights (Federal Question Jurisdiction, U.S. v Hayes, 4544 U.S. 847.

That if criminal charges are to be considered, then this court should review the U.S. v Guest, 383 U.S. 745 decision. Faulkner, the prosecuting attorney and the trial judge are within the provisions for filing under Title 18, U.S.C. 241.

Q. (Prosecutor to James Faulkner): All right, so let me see, maybe I'm not being clear. When I asked you if you would accept the money he set out there that he owed you, about $4,000.00; When you say you don't know, what do you mean, do you mean that you want more, or you wouldn't take any?

A. I feel that I'm entitled to the full $8,000.00 that I gave him.

The District Court during its

preliminary examination Vol V, p. 32 established the fact that at least $4,000.00 should have been returned to the Faulkners.

The District Court did establish the fact that money from the Trust was used to pay for material and subcontractors, and that the Petitioner (Bennett) did pay all subcontractors and material.

That during the trial, the people established the fact through exhibits No. 2 and No. 3 that two checks were issued to Douglas Bennett personally and were cashed by Douglas Bennett.

That after review People v Miller 78 Mich App 336 (P. 345), the court cited Chambers v Chambers 207 Mich 129, 136, 173 N.W. 367 (1919).

"While the prudent contractor will probably maintain individual accounts for particular projects and maintains careful records of transactions, we do not believe the statute mandates any particular form or procedure in handling the Trust Fund.

The Petitioner argued that he was willing to refund the balance of the Trust, Peoples Exhibit P.X. 7. Reviewing M.C.L. 570.152, only the $4,4000 remained in the Trust and the petitioner was only required to retain the balance of the Trust. The only demand made by the Faulkners was for the full $8,000. The petitioner's argument is that he (Bennett) raises the issue of due process, 14th Amendment to the United States Constitution.

Responding to Respondent's argument that the petitioner violated M.C.L. 339.2401 (B); M.S.A.

18 425 (2401) (B), "Residential maintenance and alteration contractor" means a person, who for a fixed sum . . . undertakes with another for the . . . laying of concrete on residential property . . .

The Petitioner's argument at-law is that the laying of concrete does not fall within the police powers as found in Black's Law Dictionary, 4th Edition.

The power vested in a state to establish laws and ordinances for the regulation and enforcement of its police as above defined. The power power vested in the legislature to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. An authority conferred by the American constitutional system upon the individual states, through which they are enabled to establish a special department of police; adopt such regulations as tend to

prevent the commission of fraud, violence, or other offenses against the state; aid in the arrest of criminals; and secure generally the comfort, health, and prosperity of the state, by preserving the public order, preventing a conflict of rights in the common intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all the privileges conferred upon him by the laws of his country.

The police powers is the exercise of the sovereign right of a government to promote order, safety, health, morals and general welfare within constitutional limits; the laying of cement does not fall within the police powers.

The petitioner's theory at-law is based on the Wyoming court Sampson v Sheridan 25 Wyo 347. The court stated ". . . Moreover, it is held that the requirement that a cement contractor shall procure a license is an unjustifiable and

unreasonable police regulation (118 A.L.R.).

The petitioner, during the state criminal proceeding, called Ernest Shinavard as a witness in support of Mr. Bennett. Mr. Shinavard testified that Mr. Bennett had been laying cement in residential subdivisions and that all is required is that the job be properly inspected by a state employee's under state authority and that the concrete used meet state requirements and that Mr. Bennett was not required to be licensed to lay cement, and that under cross-examination, by prosecution, the people could not establish a counter-claim to prove otherwise (Vol. VI, pp. 29-39.

Therefore, your petitioner

brings this issue before the court to rule on the constitutionality of M.C.L. 339.2401 (B); M.S.A. 18.425 (2401) (B); and whether the statute violates Article I, §10 of the United States Constitution impairing the obligation of the contract.

II In summary respond to respondant's issues raised on page 6, the petitioner states the following to the court.

Now let's review this case, the exhibits, and the testimony (Vol 4, p. 8)

First for consideration, Faulkner delivered to Bennett an in-house delivery service of household items and products marketed by Jewel Tea.

That through this relationship

Mr. Faulkner obtained the fact that Mr. Bennett did make improvements to his residence; three additions to improve his home, and Mr. Faulkner was advised by Bennett that this would be done under a home-owner permit. The inspection would be done by City Inspectors and would have to conform to the building standards. If Mr. Bennett built the additions, they would be inspected, and Mr. Bennett would be issued an occupancy permit. All of this was explained to Mr. Faulkner while in the Bennett home.

Several months passed and Mr. Faulkner approached Bennett while he was making a delivery to the Bennetts. Faulkner said: "I am thinking about building an addition to my house, and I (Faulkner) would

like you (Bennett) to bid on the addition."

Mr. Bennett drafted a set of plans for the proposed addition and submitted a total cost for the addition.

Reviewing this issue of the total cost, Mr. Faulkner testified that Bennett was going to hire sub-contractors (Vol 4, p. 16), for Mr. Bennett could not do wiring or heating, that they required a licensed contractor to do this type of work.

The contract was signed and worked began. Now let's review the counter-statement of the respondent's p.2, paragraphs 1 and 2 -- where the respondent referred to the building permit. The respondent stated that a building permit was

never issued. The proof that was submitted to the court was a cleverly doctored exhibit.

The people submitted as an exhibit a document, which Faulkner stated he (Faulkner) was ordered by Bennett to obtain the permit. After looking very closely at the permit, the authorities signature was covered by laying a sheet of paper over it and photocopying it. This exhibit was submitted to the court for review to influence the trial judge and the respondents were allowed to proceed. That as Mr. Faulkner testified, Mr. Bennett was there when the permit was issued to Faulkner.

That the respondent should be

When referring to respondent, he is referring to the brief filed in the U.S. Supreme Court.

ordered to produce this exhibit in question, to lay to rest that a permit was issued, or was this just a request for a permit.

The respondent also stated (P. 2, par. 2): "The work became slower and slower, with the petitioner showing up for an hour and then disappearing."

Mr. Faulkner testified at trial (Vol V, p. 105 and 113) that the city ordered Faulkner to not let Bennett proceed with the laying of cement. The fact is that Bennett was willing to proceed but the city would not allow Bennett to proceed.

A review of the testimony reveals that Samual Gun advised Faulkners that even if Bennett did an "A-1" job, that they could sue top recover the entire cost of the

addition (Vol V, p. 116 - 151.

Now that the Faulkners know what is needed to recover the cost of the addition and what the prosecuting attorney needed to convict Mr. Bennett of Trust Fund violation and being an unlicensed residential builder, the Faulkners had Bennett sign a statement for completion of the addition and a cost breakdown of the addition. That Mr. Faulkner testified that he (Faulkner) was advised by the City of Farmington Hills that Bennett could not proceed with the addition, and after being advised Mr. Faulkner wanted Bennett to complete the addition. The only conclusion that can be reached is that there was no violation of the Building Trust Fund and that M.C.L. 339.240 (B); M.S.A. 18.

425 (2401) (B) violates the authority of the State of Michigan to act under the Police Power Authority.

Responding to the respondent's argument (P. 7, par. 2) that the petitioner had not met the requirements of Rule 14 (K)(2).

The petitioner personally submitted his petition for writ of certiorari to the clerk of the court. After review by the clerk, the clerk pointed out the defects. The clerk docked the brief and the petitioner was given twenty days to correct and resubmit to the clerk of the court. The clerk did not advise the petitioner of the printing error.

That after reading Rule 33 (C), "The document should be printed on both sides of the page,

if practicable."

III Responding to this issue, when the petitioner printed his brief it was not practicable to have the brief printed on both sides. This could is aware that there are lawsuits pending in the Federal District Court.

The petitioner was ordered by the U.S. District Court trial judge to advise the court of the standing of the criminal appeal. The petitioner must comply with the filing requirements of the U.S. District Court. The petitioner filed with the court two copies of the writ of certiorari and mailed a copy to all attorneys of record. The copies were duplicated on 8½" x 11" paper size. To conform to the standards

of this court, the brief was cut to size. This method cut the cost of producing the brief.

Your petitioner is a cement contractor. The petitioner could not afford the $24.00 per page charge that was quoted by a printing company. After reviewing the rules of this court and having the brief reviewed by the clerk of the court, the petitioner is of the opinion that the petitioner met the requirement of the court. At the request or order of the court, the petitioner will submit a new brief to meet the requirements of the court.

Your petitioner prays that this court not hold this petitioner to the same standards as a licensed attorney in view of Haines v Kerner,

404 U.S. 519.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, your petitioner prays that this honorable court grant the writ of certiorari to review the decision of the Michigan Court of Appeals.

DATE
Aug. 17, 1992

Respectfully submitted,

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